90-1179

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

STATE FARM GENERAL INSURANCE COMPANY,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
STATE FARM LIFE INSURANCE COMPANY, AND
STATE FARM FIRE AND CASUALTY COMPANY,
Petitioners,
v.
MURIEL E. KRASZEWSKI, DAISY O. JACKSON, AND WILDA TIPTON,
ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS
SIMILARLY SITUATED,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

At the remedies phase of an employment discrimination class action, do district courts have discretion to provide for the accrual of back pay for individual class members as seems appropriate in light of the facts and circumstances of the case?

LIST OF PARTIES

There are no parties to this action other than those identified in the caption of the within action.

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IN THE

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No. _____

STATE FARM GENERAL INSURANCE COMPANY, et al.,
Petitioners,

v.

MURIEL E. KRASZEWSKI, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, collectively State Farm Insurance Companies ("State Farm" or "Company"),* respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on August 31, 1990.

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* State Farm's parent company is State Farm Mutual Automobile Insurance Company. All of State Farm's subsidiaries are wholly owned.

OPINIONS BELOW

The opinion of the court of appeals is reported at 912 F.2d 1182, and is reprinted in the appendix (App. A-1). The memorandum order of the United States District Court for the Northern District of California dated June 8, 1988, is not reported but is reprinted in the appendix (App. A-10).

JURISDICTION

The opinion of the court of appeals was filed on August 31, 1990. State Farm filed timely petitions for rehearing and for rehearing en banc, which were denied on October 23, 1990. (App. A-21.) The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This has become one of the largest and most protracted class action cases in the history of Title VII of the Civil Rights Act of 1964. Class Counsel have estimated potential liability for back pay and front pay for the approximately 1100 class members to be as high as $500 million. The lawsuit began on June 1, 1979. Plaintiffs alleged sex discrimination by State Farm in California with respect to the hire of women into its sales agent position of "Trainee Agent." The district court certified the class on September 9, 1981, and bifurcated the proceedings into a liability phase (Stage I) and a remedy phase (Stage II) on November 6, 1981. Trial started on March 31, 1982, and ended on February 14, 1983. On April 29, 1985, after a long illness, the district judge issued findings which held State Farm liable for sex discrimination in the recruitment, selection, and hire of Trainee Agents within the State of California. *Kraszewski v. State Farm General Ins. Co.*, 38 Fair Empl. Prac. (BNA) Cas. 197 (N.D. Cal. 1985) ("Stage I findings").

On June 21, 1985, State Farm substituted its counsel of record. On December 9, 1985, and April 2, 1986, State Farm and Class

Counsel, respectively, moved the district court for an order regarding the most appropriate procedure for determining and distributing damages at Stage II. State Farm argued for the formula distribution of damages; Class Counsel argued for an individual hearing procedure. The district court ruled for plaintiffs on July 17, 1986 and encouraged the parties to negotiate their remaining differences. *Kraszewski v. State Farm General Ins. Co.*, 41 Fair Empl. Prac. (BNA) Cas. 1088 (N.D. Cal. 1986) ("July 17 order").

As a result of these negotiations, State Farm and Class Counsel agreed to the terms of a Claim Procedure Decree, which is a *hybrid* of the positions espoused by State Farm and by Class Counsel, and which the district court approved and entered on March 15, 1988. The Decree provides for the calculation of individual make-whole damages *solely* by reference to an agreed *formula*, which incorporates every major component of Title VII monetary liability, including back pay, front pay, mitigation, employee attrition, and interest. It also provides for the determination of *entitlement* to such formula make-whole damages *solely* by resort to individual *hearings*.

The Decree did not resolve every dispute that the parties encountered during their settlement negotiations. Notably, the Decree left unresolved the issue underlying this appeal – the date on which the accrual of back pay liability terminates. The parties agreed that back pay must accrue to March 15, 1988, the date that the district court approved the Decree. The parties further agreed that interest must run to the date of each individual judgment. The parties, however, reserved the question whether back pay accrual should cease on March 15, 1988, or on the date of each individual judgment, or on some date in between.

In simultaneous motions before the district court, State Farm contended that back pay accrual should cease on March 15, 1988,[1]

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[1]March 15, 1988 was the cutoff date in the Decree for make-whole relief to the three named plaintiffs. Moreover, March 15, 1988 was

and Class Counsel contended that back pay accrual should cease on the date of each individual judgment. The district court held oral argument and opened the hearing with an admission of difficulty interpreting the proper legal standard for the analysis of the issue. While the court believed that the facts and circumstances of the case supported an early termination of back pay accrual, it viewed its discretion to weigh such facts as severely limited as a matter of law.

> It appears to me that the facts favor State Farm and the law appears to favor plaintiffs . . . . I find myself wondering whether I have the discretion to choose one of these two dates [March 15, 1988, or the date of each individual judgment] or to otherwise compromise this dispute.

On June 8, 1988, the district court issued its order ("June 8 order"), ruling that Title VII did not permit the exercise of the "wide discretion" that the Supreme Court had authorized in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) ("*Albemarle*"). Instead, the district court held that "absent compelling circumstances . . . its equitable discretion [was] confined by case law that virtually compel[led] full accrual." (App. A-11.) The district court thus ruled that back pay must accrue to the date of each individual judgment, offset by one year to accommodate the illness of the district judge.[2]

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14 years after the beginning of the liability period, 9 years after the filing of the complaint, and 5 years after the end of trial. *Throughout this entire period, back pay has continued to accrue.* State Farm raises in this appeal only the issue whether back pay must continue to accrue *subsequent* to this period, or whether only *interest* continues to accrue to the date of each individual judgment.

[2]The district court awarded this offset after noting that "following change of counsel, State Farm has 'done equity.' State Farm has committed itself to both compensating harmed individuals and altering its discriminatory conduct." (App. A-18.)

State Farm believed that the district court had all but relinquished its equitable discretion through the formulation and application of an erroneous rule of law. The Company, therefore, appealed the June 8 order to the Ninth Circuit. On August 31, 1990, the Ninth Circuit, in an opinion by Judge Stephen Reinhardt, affirmed the district court's decision to award back pay accrual to the date of each individual judgment, and reversed and remanded that part of the district court's order that deducted one year's back pay for the delay caused by the district judge's illness. The Ninth Circuit denied State Farm's Petition for Rehearing and Suggestion for Rehearing En Banc on October 23, 1990.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has created a new rule of compelled back pay accrual-to-judgment for Title VII cases which squarely violates the directive of this Court in *Albemarle* that courts exercise "wide discretion" to fashion the most appropriate monetary relief. The Ninth Circuit's new rule also creates a direct conflict with a Title VII decision from the Seventh Circuit terminating back pay accrual on the date of *class* judgment in an individual hearing procedure. The Ninth Circuit's new rule further conflicts with the holdings of the nine federal circuits that have considered the adequacy of formula relief – and unanimously concluded that back pay accrual may terminate on the date of *class* judgment consistent with the make-whole principles of Title VII. Finally, the Ninth Circuit's new rule conflicts with the established principle that *interest* may compensate for delay, and thus the decision *encourages* protracted litigation. These circumstances demonstrate the exceptional importance of this case and the need for this Court to exercise its authority to review the judgment below.

I. The Ninth Circuit's Imposition of a Rigid Rule Disregards this Court's Instruction to Exercise Wide Discretion in Fashioning Make-Whole Relief and Conflicts with Circuit Law Regarding Make-Whole Relief in Title VII Class Actions.

In a Title VII action, once liability has been established, section 706(g) empowers courts finding illegal discrimination to "order such affirmative action *as may be appropriate*, which may include, but is not limited to, reinstatement or hiring of employees, *with or without* back pay . . . or any other equitable relief *as the court deems appropriate*." 42 U.S.C. § 2000e-5(g) (1982) (emphasis added). This section was intended to provide courts with broad discretion in awarding relief in Title VII actions. Section-by-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972, Conference Report, 118 Cong. Rec. 7166, 7168 (1972) ("The provisions of this subsection are intended to give the courts *wide discretion* in exercising their equitable powers to fashion the most complete relief possible") (emphasis added).

Citing this section, this Court in *Albemarle* held

> given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.

422 U.S. at 421-22. Thus, while establishing what subsequent decisions have called a "preference" in favor of *some* back pay upon

proof of discriminatory wage loss, *Albemarle* makes it clear that the precise remedy for any given case is left to the "wide discretion" of the district courts which "is equitable in nature." *Id.* at 416, 421.

In cases involving *individual plaintiffs*, the circuit courts have adopted a general rule that when discriminatory wage loss is proven, back pay awards shall accrue to the date of judgment. *See, e.g., Thorne v. City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986); *Nord v. United States Steel Corp.*, 758 F.2d 1462 (11th Cir. 1985). This general rule often is the most appropriate means of achieving make-whole relief in such individual cases, because on the date that the court enters judgment in the plaintiff's favor, there is a *single* order addressing *both* liability and a remedy, and as of this date, back pay accrual terminates. Any delay between the date of the court's judgment and the plaintiff's actual receipt of her damage award is compensated by the payment of interest.

However, *class actions* implicate very different considerations from individual lawsuits, due in part to the sheer numbers involved. Consistent with *Albemarle's* grant of "wide discretion," and consistent with *Albemarle's* admonition to fashion "the most complete relief possible," the circuit courts have upheld a variety of mechanisms for distributing make-whole relief. Thus, despite a "preference" for individual hearings where feasible, the circuits have uniformly held that in class actions, victims of discrimination may be made whole through the use of *either* individualized awards *or* classwide, formula distribution of monetary relief, and that *either* procedure satisfies "the most complete relief possible" standard. *See, e.g., Segar v. Smith*, 738 F.2d 1249, 1289-90 (D.C. Cir. 1984) ("*Teamsters* . . . should not be read as an unyielding limit on a court's equitable powers to fashion effective relief for proven discrimination . . . later courts have often faced situations in which the *Teamsters* hearing preference had to bend to accommodate Title VII's remedial purposes"), *cert. denied*, 471 U.S. 1115 (1985); *see also Hartman v. Wick*, 678 F. Supp. 312, 333-34 (D.D.C. 1988) ("because the Court is aware of the enormous disruption these hearings can cause counsel

and the Court or its designee, as well as the enormous dedication of resources the hearings require, the Court believes that the interests of justice would best be served if individualized hearings could be avoided"); *Love v. Pullman Co.*, 13 Fair Empl. Prac. (BNA) Cas. 423, 428-29 (D. Colo. 1976) ("compensating the plaintiffs in this case by means of a classwide formula is not only permissible, it is the only workable method when confronted with a total class of about 1500 employees"), *aff'd*, 569 F.2d 1074 (10th Cir. 1978). *Every* circuit that has ever compared classwide, formula distribution of monetary relief with individualized awards has held that *both* satisfy the concept of make-whole relief.[3]

Furthermore, consistent with *Albemarle's* grant of "wide discretion," courts have terminated back pay accrual in class actions on various dates, depending on the facts of each case. Unlike the cases involving individual plaintiffs, in which back pay awards generally accrue to the date of judgment, in *every* class action formula case published, *back pay accrual ceases when the fund is approved*, without regard to the time it takes to distribute those funds. Moreover, in a class action involving *individual hearings*, the Seventh Circuit upheld the termination of back pay accrual as of the date of the district court's back pay order – a decision the Ninth Circuit simply ignored. *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977).

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[3]*See, e.g., Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); *Domingo v. New England Fish Co.*, 727 F.2d 1429 (9th Cir. 1984), *modified on other grounds*, 742 F.2d 520 (9th Cir. 1984); *Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807 (2d Cir. 1983), *cert. denied sub nom. International Brotherhood of Electrical Workers v. Ingram*, 464 U.S. 937 (1983); *Hameed v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 637 F.2d 506 (8th Cir. 1980); *Love v. Pullman Co.*, 569 F.2d 1074 (10th Cir. 1978); *White v. Carolina Paperboard Corp.*, 564 F.2d 1073 (4th Cir. 1977); *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), *cert. denied*, 439 U.S. 1115 (1979).

Most importantly, while virtually all cases – whether individual actions or class actions and whether involving individualized hearings or formula relief – involve some passage of time between the *end of accrual* and the *actual payment* of damages (for example, when the distribution of class damages takes several months to complete or when an individual judgment is appealed), the federal courts typically compensate for such delays by requiring accrual of *interest*, not continued accrual of damages. As this Court has stated,

> Interest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money.

Library of Congress v. Shaw, 478 U.S. 310, 322 (1986).

Contrary to this Court's mandates, the Ninth Circuit has ruled that the lower courts are *not* empowered with "wide discretion" and, moreover, that *both* the continued accrual of back pay *and* interest are necessary to compensate for the delay factor. The implications of the Ninth Circuit's holding are staggering. First, it runs directly counter to *Albemarle*. Second, it is clearly inconsistent with the individual hearing procedure decision of the Seventh Circuit in *Stewart*. Third, it effectively holds that the entire line of formula relief cases has been incorrectly decided by terminating back pay accrual on the date of class judgment, rather than on the dates of individual payment. In short, the Ninth Circuit has now held that, whether damages are distributed at Stage II by resort to an individual hearing procedure or formula distribution procedure or a hybrid, back pay accrual to *class* judgment constitutes *not* make-whole relief, but *reversible error*.

II. The Consequences of the Ninth Circuit's Rule Are to Encourage Protracted Litigation and to Waste Judicial Resources.

In the present case, claimants *could have* received their damage awards on the date of the court's approval of the Consent Decree but for the court's order to conduct entitlement hearings, because the *amount* of each claimant's relief is determined through an agreed-upon formula. To *mandate* continued back pay accrual under these circumstances is particularly unjust, because it creates a powerful incentive for Class Counsel to draw out Stage II proceedings as long as possible so that each claimant's "pot" will continue to grow. In the words of Judge Hug, who sat on the Ninth Circuit panel hearing oral argument for this appeal, "How do I get to be the claim that is heard last?"

The result of the Ninth Circuit's holding is that each claimant has an incentive to increase her total award at a tremendous waste of judicial resources. The continued accrual of back pay also creates a disincentive for Class Counsel to agree to settlement of individual claims on the basis of compromised calculations, because "holding out" for the hearings produces much greater damages simply by the passage of time.[4] This runs completely counter to Title VII's purpose of settling such matters expeditiously. Moreover, a rule of compelled accrual is a strong disincentive against an employer agreeing to individualized hearings – despite this Court's articulated preference for such hearings – due to the massive financial impact of continuing

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[4]Claims are aggregated by calendar year within the liability period that runs from 1974 through 1987. Consider the impact upon a 1984 claim of the "wait" for a hearing date. Depending upon whether that claim is scheduled for hearing in 1991, 1993, or 1997, the damages awarded to a successful claimant would increase from $229,699 in 1991, to $412,017 in 1993, and to $1,052,794 in 1997.

back pay accrual for large numbers of individuals over a period of years.[5]

CONCLUSION

The question presented here is of clear and pressing importance. Settlement of Title VII class actions should be encouraged, and victims of discrimination should be made whole. But the Ninth Circuit has created confusion as to what constitutes make-whole relief and, in the process, has created a rule that actively discourages settlement by rewarding extensive litigation and delay. These results demonstrate the need for review by this Court.

Respectfully submitted,

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January 1991

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[5]At the time this Petition was filed, nearly three years after the district court approved the Consent Decree, and 17 years after the beginning of the liability period, 55 claims have been resolved. Approximately 1,050 claims remain. The claim procedure is not expected to conclude before 1999.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 88-15337, 88-15399

Muriel E. KRASZEWSKI; Daisy O. Jackson;
Wilda Tipton, on behalf of themselves
and all other persons similarly situated,

Plaintiffs-Appellees/Cross-Appellants,

v.

STATE FARM GENERAL INSURANCE COMPANY;
State Farm Mutual Automobile Insurance Company;
State Farm Fire and Casualty Company,

Defendants-Appellants/Cross-Appellees.

Argued and Submitted Oct. 4, 1989

Decided Aug. 31, 1990

Guy T. Saperstein, Mari Mayeda, Farnsworth, Saperstein & Seligman, Oakland, Cal., for plaintiffs-appellees/cross-appellants, Muriel E. Kraszewski, et al.

Raymond L. Wheeler, Kirby Wilcox, Erica B. Grubb, Debra L. Hamilton, Morrison & Foerster, San Francisco, Cal. for defendants-appellants/cross-appellees, State Farm Ins. Companies.

Charles A. Shanor, Gen. Counsel, Gwendolyn Young Reams, Associate Gen. Counsel, Vincent Blackwood, Asst. Gen. Counsel, Donna J. Brusoski, E.E.O.C., Washington, D.C., for E.E.O.C. as amicus curiae.

Appeal from the United States District Court for the Northern District of California.

Before HUG, FARRIS and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

Plaintiffs brought a class action in United States District Court for the Northern District of California, alleging that defendant State Farm General Insurance Company ("State Farm") engaged in statewide discrimination with respect to the recruitment, hiring and training of women for sales agent positions, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Following trial, the district court ruled that State Farm was liable for classwide sexual discrimination. The court found that women who attempted to become Trainee Agents were "lied to, misinformed, and discouraged in their efforts to obtain the entry level sales position." *Kraszewski v. State Farm General Ins. Co.*, 38 Fair Empl. Prac. Cas. (BNA) 197, 257, 1985 WL 1616 (N.D. Cal. 1985). These findings as to general

liability were issued more than two years after the trial, a delay due in substantial part to the judge's prolonged illness. The court also ordered the use of individual "*Teamster*" hearings to determine individual liability and damages.[1] *Kraszewski v. State Farm General Ins. Co.*, 41 Fair Empl. Prac. Cas. (BNA) 1088, 1089, 1986 WL 11746 (N.D. Cal. 1986).

After the court's order requiring individual hearings, the parties settled nearly every damage question. They agreed, however, that each plaintiff would be required to establish her entitlement to relief in a separate, non-judicial proceeding before one of seven special masters. The parties also left open the proper termination date for back pay liability: they asked the district court to determine whether State Farm's back pay liability should terminate on the date the court approved the consent decree or on the date each individual plaintiff ultimately receives a judgment in her favor. This appeal involves only the issue of the proper termination date for back pay liability.

Following an oral hearing, the district judge held for the plaintiffs, concluding that back pay liability should continue to accrue until the date of individual judgment or settlement. He did so in an extremely thorough, thoughtful and well-reasoned opinion, after weighing all the interests involved and balancing them carefully. The court also decided to subtract one year's back pay from each individual's potential judgment, although neither party had suggested such a compromise. The reason for the deduction was that the judge did not want State Farm to bear the increased liability attributable to the delay caused by his illness.

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[1] In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361, 97 S. Ct. 1843, 1867-68, 52 L.Ed.2d 396 (1977), the Supreme Court held that individual hearings are the preferred method of determining damages in Title VII cases. Since *Teamsters* such hearings have become routine.

State Farm appeals from the part of the court's order providing that back pay will accrue on a case-by-case basis until each individual receives a judgment or settlement. Plaintiffs cross-appeal from the part of the order shortening the individual accrual periods by one year. We uphold the district court's determination that back pay continues to accrue until the date of individual judgment, but conclude that the court erred in subtracting one year's damages from each individual's potential back pay award. We therefore affirm in part, reverse in part, and remand.

In choosing the date of individual judgment as the proper termination date for back pay liability, the district judge did not abuse his discretion. *See E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989) (district court's calculation of a back pay award is reviewed only for an abuse of discretion). In fact, he applied the rule courts must generally follow in Title VII cases. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S. Ct. 2362, 2372, 45 L.Ed.2d 280 (1975), the seminal case in the field, the Supreme Court explained that the principal objectives of Title VII are to eliminate the vestiges of employment discrimination and to make persons whole for injuries suffered due to such discrimination. The Court directed that "[t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Id.* at 419-20, 95 S. Ct. at 2372-73 (quoting *Wicker v. Hoppock*, 6 Wall. 94, 99, 73 U.S. 94, 18 L.Ed. 752 (1867)). Moreover, according to the Court:

> Congress' purpose in vesting a variety of 'discretionary' powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but, rather *to make possible the 'fashion[ing] [of] the most complete relief possible.'*

Id. 422 U.S. at 421, 95 S. Ct. at 2373 (emphasis added).

Since *Albemarle*, the Supreme Court and lower courts have, as a matter of course, awarded back pay relief to plaintiffs, and, also as a matter of course, have granted that back pay until the date of judgment. Such relief has uniformly been viewed as necessary to put the victim in the place he would have been – to make him whole. Thus in *Thorne v. City of El Segundo*, 802 F.2d 1131, 1136 (9th Cir. 1986), we held, "absent compelling circumstances, when an employer has refused to hire an employee in violation of the employee's rights under Title VII, *the court should compute the back pay award from the date of the discriminatory act until the date of the final judgment.*" (emphasis added). In *E.E.O.C. v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 590 (2nd Cir. 1976), *cert. denied sub nom. Rios v. Enterprise Ass'n Steamfitters, Local No. 638*, 430 U.S. 911, 97 S. Ct. 1186, 51 L.Ed.2d 588 (1977), the Second Circuit reversed the district court's termination of its back pay award on the date it ordered injunctive relief, since that date was inconsistent with the "make whole" purpose of back pay. The court stated,

> [o]bviously, the injunctive relief did not provide for immediate entry into the A Branch for all identifiable victims of past discrimination (much less immediate job placement of those who had been denied equal job referrals). It is the date of actual remedying of discrimination, rather than the date of the district court's order, which should govern.

Id. The Sixth Circuit reversed a district court order that terminated back pay when the employer ceased its general policy of discrimination. The court explained that "[g]enerally, where an employer has discriminatorily refused to hire an employee, contrary to that employee's rights under Title VII, an award of back pay will be computed from the date of first refusal until final judgment." *E.E.O.C. v. Monarch Machine Tool Co.*, 737 F.2d 1444, 1453 (6th Cir. 1980). The Eleventh Circuit, in *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1473 (11th Cir. 1985), similarly concluded that the district court erred by ending back pay on the date

of the court's oral findings, four months before judgment was entered. Terminating back pay prior to judgment was considered to be "contrary to the 'make whole' purposes of Title VII." *Id. Accord, Gonzalez v. Markle Manufacturing Co.*, 487 F. Supp. 1088, 1092 (W.D. Tex.) (plaintiff entitled to back pay until date of judgment not date of magistrate's report), *aff'd*, 614 F.2d 1083 (5th Cir. 1980); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir.) (back pay extends until the date of judgment), *cert. denied*, 429 U.S. 920, 97 S. Ct. 315, 50 L.Ed.2d 286 (1976); *Hartman v. Wick*, 678 F. Supp. 312, 336 (D.D.C. 1988) ("In keeping with the remedial, make-whole purpose of back pay, the cut-off date of each back pay award will be the day on which the award is approved for the particular claimant."). The district court's approval of the consent decree provides no more relief for an individual claimant (other than the name parties) than did the order granting injunctive relief in *Enterprise*, the court's oral findings in *Nord*, or the employer's cessation of its discriminatory policy in *Monarch*. In the case before us no individual claimant will have a right to *any* relief until she obtains an individual judgment of liability in the non-judicial proceedings. The date of that judgment is the date on which State Farm's discriminatory practices will be remedied as to the individual plaintiff. Thus, unless there is a compelling reason for deviating from the general rule here, the district court's order must be affirmed.

We recognize that, as State Farm emphasizes, this is a case in which a formula has been adopted for resolving most damage issues, and we acknowledge that a logical argument can be made for a uniform termination date in such cases. However, we are not persuaded by that fact that the district court erred when it concluded that no compelling reason existed for departing from the general rule that back pay should continue to accrue until the date of judgment.[2]

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[2] State Farm divides the Title VII cases involving class actions into "pure formula relief" cases and "individualized hearing" cases, and argues that in both courts have terminated back pay before final judgment. State Farm characterizes the instant suit as a "hybrid," since the parties' consent decree provides for formula-based payments to be made to class members whose

We also recognize that, as State Farm argues, awarding back pay until the date of individual judgment will result in some inter-claimant inequity. However, this is no different than in the ordinary back pay case. Any time an employer has discriminated against more than one employee there is the possibility that one claimant may settle early while another may go to trial, or that different claimants may have different trial dates. Thus, under the well-established make-whole rule, there is always the possibility that one claimant will receive more back pay than another simply by virtue of the timing of the ultimate settlements or judgments.

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entitlement is determined through individualized hearings. We do not find the pure formula cases such as *Hameed v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local Union 396*, 637 F.2d 506 (8th Cir. 1980), to be apposite. There may well be reasons not to continue back pay accrual until judgment when the monetary effects of discrimination are determined on a classwide basis and then divided *pro rata* among the class members. State Farm cites only two "individualized hearing" cases in support of its proposition. State Farm first notes that in *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 289 (2nd Cir. 1981), *cert. denied*, 455 U.S. 988, 102 S. Ct. 1611, 71 L.Ed.2d 847 (1982), the court terminated back pay before final judgment either on the date that a claimant was actually hired or on the date that a claimant "ceased or failed to meet any of the City's requirements . . . or ceased to have interest, whichever is earlier." We find this holding perfectly consistent with the general rule in Title VII cases of awarding back pay until the harm is fully remedied. A claimant ceases to suffer damages when the employer offers him the job he sought or when he becomes unqualified to hold the position or is no longer willing to accept it. The second case State Farm cites is *Stewart v. General Motors Corp.*, 542 F.2d 445, 454 (7th Cir. 1976), *cert. denied*, 433 U.S. 919, 97 S. Ct. 2995, 53 L.Ed.2d 1105 (1977), in which the court, without explanation, provided for the termination of back pay on the date the district court entered its decree. The opinion does not reveal whether or not this was the termination date the plaintiffs requested or even whether plaintiff agreed or disagreed with the date ordered by the court. In any event, we agree with the district court below that *Stewart*, which was decided before *Teamsters* and most of the other relevant cases, is not in line with present authority.

Title VII grants a district court broad discretion to formulate a remedy for victims of unlawful discrimination. To the extent the district court's power is limited, it is because the court has an obligation to fashion the most complete relief possible. *See Albemarle*, 422 U.S. at 418, 95 S. Ct. at 2372 ("the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future"). State Farm argues that in this case the district judge failed to exercise his discretion. It claims that the judge concluded that he was required to rule for plaintiffs. State Farm simply misreads the district judge's opinion. The district court carefully considered a number of reasons proffered by State Farm for departing from the general rule of awarding back pay until judgment and, after weighing all the facts and circumstances, found those reasons not to be compelling. *See Thorne*, 802 F.2d at 1136 (requiring a compelling reason to justify not awarding back pay until the date of final judgment). When a judge ultimately concludes that the law dictates a particular result, that does not mean that in the process of doing so he has not exercised his discretion. However, once that discretion has been exercised, and the judge has reached certain determinations, the law may indeed tell him what the final resolution must be. Here, having determined in his discretion – which must be guided by prior Title VII rulings – that State Farm's reasons were not compelling, the district court properly applied the general rule.

The court did err, however, in deducting one year's back pay for each claimant to account for the delay caused by the judge's illness. The Supreme Court has held that the costs of delay not attributable to either the employer or the employee are to be borne by a wrongdoing employer rather than a wronged employee. *See N.L.R.B. v. J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 264-66, 90 S. Ct. 417, 420-22, 24 L.Ed.2d 405 (1969). While *Rutter-Rex* involved the National Labor Relations Act ("NLRA"), as amended, 61 Stat. 136, 147, 29 U.S.C. § 141 *et seq.*, we find the rules to be equally applicable in Title VII cases. The remedial provisions of Title VII

were modeled on the NLRA, *see Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 226 n.8, 102 S. Ct. 3057, 3062-63 n.8, 73 L.Ed.2d 721 (1982); *Albemarle*, 422 U.S. at 419, 95 S. Ct. at 2372-73, and the purposes behind the back pay provisions of each statute – to make employees whole and to deter future employer misconduct – are similar. We note that the Supreme Court has cited *Rutter-Rex* with approval in at least one Title VII case, *see Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769, 96 S. Ct. 1251, 1266, 47 L.Ed.2d 444 (1976), although on a different if related point, and that the Tenth Circuit has concluded, as we do here, that the rule of *Rutter-Rex* applies in Title VII actions. *See United States v. Lee Way Motor Freight Inc.*, 625 F.2d 918, 932-33 (10th Cir. 1979). In reducing each individual's back pay award by one year to avoid "penalizing" State Farm for the court's delay, the district court impermissibly shifted the burden of the delay to the wronged employees. Accordingly, we reverse that portion of the court's order.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 79-1261 TEH

MURIEL E. KRASZEWSKI, et al.,

Plaintiffs,

v.

STATE FARM GENERAL INSURANCE COMPANY, et al.,

Defendants.

ORDER RE BACKPAY ACCRUAL *

This matter comes before the Court on cross-motions regarding back pay accrual. After careful consideration of the parties' papers and oral arguments, the Court finds that successful claimants are entitled to back pay accrual until the date of judgment or settlement, with an important one year's pay deduction described at the end of this Opinion.

Background.

On July 17, 1986, this Court issued its Stage II Remedies Order. *Kraszewski v. State Farm Insurance Company*, 41 FEP Cases 1088, 1089 (N.D. Cal. 1987). In that Order, we held that "plaintiffs are entitled to individualized hearings in order to ensure 'make whole' relief." *Id.* at 1093.

Following that Order, the parties negotiated an admirably comprehensive consent decree to govern, *inter alia*, these individualized hearings. The parties have appointed seven special masters to adjudicate these hearings, delineated the applicable burdens of proof, and established formulas for the calculation of damages. Accordingly, the sole issue for the special masters to determine is whether each claimant is entitled to the prescribed damage formula.

The parties have left one major issue unresolved: at what date shall liability for back pay terminate? State Farm argues that back pay accrual should terminate on March 15, 1988 ("early accrual"), the date the Court approved the consent decree. Plaintiffs contend that back pay should accrue until the date that each claimant receives a judgment in her favor, or State Farm settles her claim ("full accrual").

We have discerned four areas of dispute that shape the parties' respective views on the appropriate remedy. These areas are 1) the extent to which our equitable power is confined by existing case law; 2) the extent to which either accrual date would foster inter-claimant equality; 3) the extent to which full accrual would convert the individualized hearing process into an unfair penalty for State Farm; and 4) the extent to which full accrual would subvert the hearing process. We consider each in turn.

1. Case Law Governing the Court's Equitable Powers.

State Farm and plaintiffs advance opposing views of the nature of the Court's remedial authority. State Farm contends that the Court's authority is wholly equitable; we should therefore balance the interests of the claimants, the court, and State Farm, and choose a date which adequately compensates the successful claimant but avoids imposing an unfair penalty upon State Farm. Plaintiffs agree that the Court's power is equitable, but argue vigorously that our equitable discretion is confined by case law that virtually compels full accrual.

In the interest of expediting a decision on this matter, we dispense with a lengthy discourse on Title VII remedial law. Instead, we note that case law overwhelmingly supports plaintiffs' position; back pay accrual to the date of judgment is the standard Title VII monetary remedy. For example, in *E.E.O.C. v. Enterprise Ass'n Steamfitters*, 542 F.2d 579, 590 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977), the court reversed the district court for terminating accrual at the date of the decree. The court held that "since the purpose of back pay is to make whole the victims of discrimination . . . the date of actual remedying of discrimination" should govern. Similarly, in *Thorne v. City of El Segundo*, 802 F.2d 1131, 1136 (9th Cir. 1986), the court stated that "[a]bsent compelling circumstances, when an employer has [violated Title VII], the court should compute the back pay award from the date of the discriminatory act until the date of final judgment."

This principle has been routinely applied in cases in which the parties conduct individualized *Teamsters* hearings during Stage II. For example, in *Hartman v. Wick*, 678 F. Supp. 312 (D.D.C. 1988), class action plaintiffs sued the United States Information Agency for gender discrimination. The Court found that the USIA had violated Title VII and ordered individualized *Teamsters* hearings to determine which class members would be compensated. *Id.* at 325. Like this case, the court anticipated that a large number of hearings would be conducted. *Id.* at 335. Though the court did not extensively discuss the appropriate back pay accrual date, the court stated "[i]n keeping with the remedial, make-whole purpose of back pay, the cut-off date of each back pay award will be the day on which the award is approved for the particular claimant." *Id.* at 336.

Similarly, in *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 931 (10th Cir. 1979), the district court found class-wide racial discrimination, and appointed a special master to ascertain damages for each claimant. *Id.* at 925. The special master set an accrual termination date of April 1974, the date the court entered a preliminary injunction. The district court "reversed" the special master

on the accrual date, and ordered accrual until September 1977, the date the court resolved all issues for individual claimants. The Tenth Circuit affirmed the use of that date, holding that adoption of the special master's date would "fall far short of achieving equitable relief and rendering the employee whole." *Id.* at 933.

Given these and numerous other precedents, we cannot agree with State Farm that these cases merely establish a broad set of abstract principles that compel no particular result.[1] Instead, we find that the clear thrust of Title VII remedial law is to award back pay until the date of final judgment. Thus, we place the burden on State Farm to advance compelling reasons why we should depart from this well-established rule. To those reasons we now turn.

2. Inter-claimant Equality.

State Farm argues that if we order full accrual, we will grant a windfall to winning claimants. State Farm first observes that the three named plaintiffs all received cash awards on March 15, 1988, the date the Court approved the decree. They next note that Class Counsel agrees that the amounts they received made them whole. Therefore, claimants who receive amounts greater than the March 15 sum plus interest would necessarily receive more than make whole relief. Since back pay accrual beyond March 15 would ensure that successful claimants receive more than the sum accrued as of March 15, full accrual bestows a windfall upon successful claimants.

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[1] State Farm cites only one case for the proposition that courts choose dates prior to judgment in Stage II cases. In *Stewart v. General Motors Corp.*, 542 F.2d 445, 454 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977), the Seventh Circuit did terminate accrual on the date of the decree. However, numerous cases have been decided after this case that conflict with that holding. We therefore find that the back pay portion of *Stewart* is not in line with present authority.

In response, plaintiffs argue that winning claimants should receive an award based on the same *theory* of entitlement dates that has been applied to the named plaintiffs. That is, the three named plaintiffs accrued back pay until March 15 because on that date, final judgment was entered in their favor. Plaintiffs argue that the same theory of entitlement should apply to the winning claimants: they too should accrue back pay until a final judgment is rendered in their favor.

This dispute is subtle, interesting, and not easy to resolve. However, on balance we agree with plaintiffs. We believe that State Farm has erred by assigning too much significance to the March 15 date. It is not a magical or metaphysical date that marks the time at which all class members would be made whole by State Farm. Indeed, State Farm proposes several other dates that the court may consider. Instead, it is merely the date at which final judgment was rendered for three class members.

On the other hand, there is some "magic" in choosing the date of judgment. The reason for choosing that date is that victims of discrimination are not made whole until the effects of discrimination are terminated, either through a job offer, a payment of cash, or both. The fact that some class members will receive more cash than others flows ineluctably from this principle, especially since the decree contemplates a succession of individualized hearings leading to different dates of final judgment.

We do not believe that the mere presence of inter-claimant inequality compels early termination of back pay. A hypothetical may help illustrate our reasoning:

Assume that two plaintiffs, refused jobs at the same company, file a discrimination suit. Prior to trial, the parties stipulate to damages; they agree upon the net income that both plaintiffs would have earned as employees for defendant. Thus, the sole issue for trial is whether these two plaintiffs were rejected for discriminatory reasons. Long before trial, the employer settles with Plaintiff One and offers her a

job plus back pay accruing to the date of settlement. The employer litigates the other plaintiff's case, and loses, one year after the settlement with the other plaintiff. Could the employer then successfully argue that the second plaintiff's back pay accrual should be terminated on the settlement date for Plaintiff One? We believe that argument must fail; a Court would not attempt to equalize the cash recovery between the two plaintiffs, but would instead require the employer to provide back pay up to the date of that judgment.

The hypothetical differs from this case only in the volume of the litigation. The volume of this litigation, however, is no reason to depart from a well-established legal rule. Accordingly, we reject this argument for early accrual.

3. Penalty Argument.

State Farm advances a corollary to the windfall argument. They contend that if back pay accrues to the date of judgment, we will have "converted a process into a penalty." State Farm observes that we could have ordered either class-wide formula relief or individualized hearings to remedy the discrimination. The hearing approach is likely to take longer to complete than a formulaic approach. Thus, if we allow full accrual, State Farm's liability may be far greater under the individualized hearings approach than under the formula process. If so, we will have turned a choice between two acceptable alternatives into a basis for far greater liability for State Farm.

We once again disagree with State Farm. Our first reaction to the penalty argument is that it proves too much. That is, *Teamsters* hearings will almost always require a longer and more costly procedure than formula relief. If it were to become a rule of law that the burden of paying for *Teamsters* hearings be borne by class members (in the form of early termination of back pay accrual), plaintiffs will be discouraged from utilizing individual hearings. Imposing this Hobson's choice on Title VII plaintiffs directly conflicts with the Supreme Court's instruction that individualized

hearings are the preferred method of resolving Stage II disputes. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371-72 (1977).

In addition, in our Stage II order, we did not make a choice between two mutually acceptable alternatives. Instead, we noted that *Teamsters* hearings are the preferred method, and found that this case fell squarely in the line of cases requiring individualized hearings, since it involved hirings, and not promotions, and since the plaintiffs had agreed to adopt an earnings formula as an alternative to complex individual damage calculations. 41 FEP Cases at 1089-90.

Moreover, we were aware when we made this decision that individualized hearings would prove a more costly process than formula relief. Indeed, we noted State Farm's concerns that individual hearings would "entangle this court . . . into the 21st century" and "produce a process spanning 7000 consecutive days – more than nineteen years." *Id.* at 1089. While we rejected that forecast, we did recognize that individual adjudications for over 1000 positions would be time-consuming and costly. We nevertheless ruled in favor of individual hearings, finding that the need to have each claim adjudicated on its merits outweighed the additional cost.

That finding supports our desire not to carve out an exception in this case. Case law precedents establish both that back pay should accrue until the date of judgment *and* that individualized hearings are the preferred Stage II remedy. Given these twin legal rules, we do not wish to place them in conflict with one another merely because these proceedings, involving many thousands of claimants, will be time-consuming and expensive. Therefore, we reject the penalty argument as a basis for early termination of back pay accrual.

4. Settlement Leverage.

Both sides also dispute the extent to which full back pay accrual will undermine the hearing process. State Farm contends that

allowing full accrual will enable claimants to refuse reasonable settlement offers and wait for continued accrual to "build settlement pressure unrelated to the merits of the dispute." State Farm's Memorandum at 21. Thus, they argue that allowing full accrual will give claimants such great settlement leverage that State Farm would be forced to settle all but the weakest claims. Accordingly, full accrual will subvert the individual hearing process.

We initially note some skepticism about this argument. The consent decree that the parties have negotiated is lengthy, detailed, and complex. The parties have anticipated numerous areas of dispute, and have negotiated them into resolution. Formulas for damages, mitigated earnings, interest, and front pay have been established in excruciating detail. Given the foresight and diligence that each side has displayed in negotiating this decree, how likely is it that State Farm left unresolved an issue which, if we decide adversely to it, will subvert a large portion of the decree? By leaving this issue unresolved and submitting it to this Court, State Farm must have apprehended the possibility that we would opt for full back pay accrual, especially given the large number of Title VII cases that support full accrual. Therefore, we must view State Farm's projections of coerced settlements with some suspicion.

Secondly, we agree with plaintiffs that State Farm's position in this litigation is similar to the position of any employer who litigates a strong Title VII claim. Title VII cases are often long and complex, and employers always take the chance that if they do not promptly settle a claim, they will face a large judgment against them.[2] It is true that in this case, State Farm no longer may make use of a procedure to expedite the processing of the claims; the first hearing will not occur until December 1989. However, in most Title VII cases in which a

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[2] Congress carefully minimized the risk to the employer by limiting damage awards to backpay and excluding punitive damage awards for violations of Title VII. 42 U.S.C. §2000-e5(g).

plaintiff survives pre-trial motions, there will be a considerable delay until the case goes to trial. The vast majority of these cases settle before trial, because it is not economical for the employer to pay the costs of conducting the trial and risking a large monetary judgment, and because plaintiffs usually prefer the certainty of a cash settlement to the risk of a trial.

We can discern no reason why these same factors should not operate here. Whatever our ruling, State Farm will settle the strongest claims and litigate the weakest. Our ruling will probably influence the claims that lie within these extremes, but it will not confer on the claimants any "advantage" that Title VII plaintiffs do not ordinarily enjoy. Therefore, we reject this argument for early termination, and hold that back pay shall accrue to the date of judgment or settlement. That holding, however, is subject to the following modification.

5. One Year Deduction.

Despite our rejection of State Farm's arguments, we do believe that following change of counsel, State Farm has "done equity." State Farm has committed itself to both compensating harmed individuals and altering its discriminatory conduct. We are also aware that these proceedings have taken an unduly long period of time. For example, two years elapsed between the end of trial and the issuance of the Court's Findings of Fact and Conclusions of Law. While some of that delay may be attributed to the complexity of the case and the press of other court business, there are other factors not within either parties' control that caused the delay. Final briefs were submitted on May 9, 1983. Due to a major illness, the Court was unable to work on this case or any other case from late June, 1983 to September 1983, at which time the Court worked on a one-quarter time basis. It was only after many months that the Court could catch up on its caseload and return its attention to this case. Totalling that time up, we find that resolution of that portion of the case was delayed for approximately one year. Thus, we find that each claimant's case should be resolved approximately one year before it will be resolved.

Accordingly, we hereby order that damage awards for successful claimants be calculated *as if* they were decided one year before they were actually decided. For example, if a claimant receives a final judgment in her favor on May 1, 1990, her damages should be calculated as if she received a final judgment on May 1, 1989. However, in no case shall any damage award be less than the sum that would accrue on March 15, 1988 plus interest on that amount as proposed by State Farm.[3]

The Court knows that the burden of delay is not ordinarily placed on the victim of discrimination. *N.L.R.B. v. Rutter-Rex Manufacturing Company*, 396 U.S. 258, 263-65 (1969); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 933 (10th Cir. 1979). However, given the history of this case, we do find that State Farm is entitled to some equitable relief from full accrual. We have therefore struck a balance by granting accrual until the date of judgment, but deducting a year's worth of liability for which State Farm should not be held responsible.

This shall be the Order of the Court. However, we note that neither side proposed this or any other compromise. This one year deduction may pose difficulties that we cannot anticipate, since we are not experts on the *Kraszewski* consent decree. Therefore, the Court

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[3] Given the fact that no hearings shall begin until December 1989, it is unlikely that any damage award would be less than the amount State Farm has proposed – accrual up to March 15 plus interest. However, if such an award under our formula is less than that latter sum, the special master shall choose the March 15-plus-interest figure.

gives each side fifteen days to object to this Opinion on the ground that the one year deduction is incompatible with the decree.

IT IS SO ORDERED.

Dated: June 8, 1988

/s/ Thelton E. Henderson
THELTON E. HENDERSON
United States District Judge

* This Opinion is not intended for publication.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-15337, 88-15399

D.C. No. CV 79-1261 TEH

MURIEL E. KRASZEWSKI; DAISY O. JACKSON;
WILDA TIPTON, on behalf of themselves
and all other persons similarly situated,

Plaintiffs-Appellees/Cross-Appellants,

v.

STATE FARM GENERAL INSURANCE COMPANY;
STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY;
STATE FARM FIRE AND CASUALTY COMPANY,

Defendants-Appellants/Cross-Appellees.

ORDER

Filed October 23, 1990

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Before: Hug, Farris, and Reinhardt, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

(2)

No. 90-1179

Supreme Court, U.S.
FILED
MAR 7 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

STATE FARM GENERAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, AND STATE FARM FIRE AND CASUALTY COMPANY,

Petitioners,

v.

MURIEL E. KRASZEWSKI, DAISY O. JACKSON, AND WILDA TIPTON, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION AND RESPONDENTS' APPENDIX VOLUME I

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QUESTION PRESENTED

At the remedies phase of an employment discrimination class action, do district courts have discretion to provide for the accrual of back pay for individual class members as seems appropriate in light of the facts and circumstances of the case?[1]

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[1] Respondents contend that the question set forth in the Petition is not, in fact, presented by this case. See pp. 13-16, *infra*.

LIST OF PARTIES

There are no parties to this action other than those identified in the caption of the within action.

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STATEMENT OF THE CASE

A. Procedural History of the Case

On June 1, 1979, the complaint was filed by two women, Muriel Kraszewski and Daisy O. Jackson, against State Farm Insurance Companies alleging discrimination on the basis of sex in recruitment and hiring into the entry-level sales position, trainee agent. After substantial discovery efforts, on September 9, 1981, the district court certified a class of female applicants and deterred applicants in State Farm's three California regions.[1] On November 6, 1981, the district court bifurcated the action into a class liability phase (Stage I) and an individual remedy phase (Stage II).

The class liability trial consumed 48 trial days over an eleven month period (March 31, 1982 through February 14, 1983). After voluminous post-trial briefs and a series of motions, the district court, on April 29, 1985, issued a 175-page Findings of Fact and Conclusions of Law, finding State Farm liable for intentional sex discrimination in the recruitment, selection and hire of Trainee Agents within the State of California.[2] These Findings and Conclusions were never appealed. Subsequently, the parties filed cross motions regarding the procedures to determine Stage II remedies. On July 17, 1986, the Court ruled that an individualized procedure determining damages would be followed and encouraged the parties to

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[1] 27 Fair Empl. Pract. Cases (BNA) 27 (N.D. Cal. 1981). (Resp. App. 1a.)

[2] 38 Fair Empl. Pract. Cases (BNA) 197 (N.D. Cal. 1985). (Resp. App. 98a.)

negotiate remaining differences.[3] This order was never appealed. On January 13, 1988, the parties presented to the district court for preliminary approval a Consent Decree Regarding Injunctive Relief and a Consent Decree Regarding Monetary Relief, Instatement Relief, And Notice ("Claim Procedure Consent Decree"). After a Rule 23 Fairness Hearing, the two decrees were approved on March 15, 1988. The Claim Procedure Consent Decree established the individualized hearing and settlement procedure which is now in progress.

B. Class Liability Findings

Plaintiffs-Respondents alleged discrimination on the basis of sex in the recruitment, selection and hire of State Farm "trainee agents," petitioners' entry-level insurance sales position. (Resp. App. 98a-100a.) The district court found that a career as a State Farm agent is "an attractive career that includes the prospect of high income, independence, and the backing of a company that provides excellent insurance products and service." (Resp. App. 108a-109a.) In fact, petitioners' Regional Vice President described the agent position as a "golden opportunity." (Resp. App. 109a.) The evidence showed that petitioners' California agents had an average net income of approximately $60,000 in 1981. (Resp. App. 120a-121a.) Agents often were promoted to agency managers, a position earning up to $125,000 per year. (Resp. App. 121a.)

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[3] 41 Fair Empl. Pract. Cases (BNA) 1088 (N.D. Cal. 1986). (Resp. App. 274a.)

As of 1975, when plaintiff Kraszewski filed charges of discrimination with the U.S. Equal Employment Opportunity Commission, 99.6% of petitioners' 1530 California agents were male.[4] (Resp. App. 123a.) In 1975, 95.4% of the trainee agents hired by petitioners were male, despite the fact that the position had virtually no minimum qualifications.[5] (Resp. App. 123a.) In that year, 100% of the agency managers, agency directors and vice presidents who had responsibility for the recruitment and

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[4] Extensive statistical evidence was provided by plaintiffs-respondents. The trial court compared the number of women hired for the trainee agent position with relevant labor market availability of women for the position. The trial court found that State Farm's hiring of women differed from expected hiring of women by factors ranging from 17 to 66 standard deviations (less than one chance in ten to the 69th power to less than one chance in ten to the 967th power). (Resp. App. 164a-168a.) These statistical proofs go far beyond the guidelines established by this Court in *Hazelwood School District v. United States*, 433 U.S. 244 (1977) (2 to 3 standard deviations) and constitute some of the largest statistical disparities ever observed in a civil rights case.

[5] The evidence was "uncontradicted that there [were] no educational requirements to become a trainee agent." (Resp. App. 151a.) In fact, one State Farm agency manager testified that "an individual need not go beyond the eighth grade to become a State Farm agent." (Resp. App. 110a.) There were no prior job experience requirements and petitioners hired male agents with a wide variety of prior job experiences. (Resp. App. 111a.) Instead of minimum or objective qualifications, petitioners relied on a wide variety of subjective factors in recruiting and hiring trainee agents. (Resp. App. 203a-206a.) The district court found that "recruiting was governed by these subjective criteria that had neither specific fixed content nor called for discrete judgment, and whose relationship was uncertain and discretionary." (Resp. App. 208a.)

hire of agents were male. (Resp. App. 122a.) Petitioners did not employ a female agency manager until 1981 (at a time when they employed 154 males in agency management positions). (Resp. App 122a.)

The district court found that women were actively discouraged from becoming trainee agents by being "lied to, and/or given false and misleading information when they have inquired about the possibility of becoming trainee agents. Women have been told about educational requirements that did not exist, financial requirements not founded in fact, and false information about the availability of positions. It was made clear to many women that the hiring of a female trainee agent was a rare occurrence and their prospects for hire as trainee agents were not good. Women interested in becoming State Farm trainee agents were told that the trainee agent position was too dangerous and not suitable for women." (Resp. App. 183a.)

Petitioners relied heavily on male nepotism in recruiting and hiring trainee agents. "In fact, it was the stated policy of State Farm between November 1965 and November 1977 that State Farm looked with favor upon 'sons and son-in-laws, brothers, brother-in-laws, and other close relatives of State Farm agents.' " (Resp. App. 216a.) Statistics showed that 383 of the agents employed by petitioners in California had relatives at State Farm, and that, of this number, 370 (96.6%) were male. (Resp. App. 217a.) The trial court found that "State Farm's reliance on male nepotism and the widespread knowledge of the use of male nepotism . . . ensured that women were grossly underrepresented in State Farm's sales force." (Resp. App. 220a.)

Petitioners claimed at trial that certain specific procedural guidelines were followed in the selection of trainee agents. The trial court found, however, that the hiring procedures were "unmonitored, unregulated and undefined." (Resp. App. 213a.) The trial court stated that,

> Although State Farm claimed to use an elaborate 'selection pool' process for the recruitment and comparison of trainee agent candidates, their actual use was virtually nonexistent . . . . Not a single defense witness above the level of agency manager could testify as having seen records of a selection pool . . . . [N]ot a single writing exists in evidence documenting these pools or how the decision to select a particular person from a particular pool was made. In fact, the record reflects that trainee agents were often preselected without use of a selection pool.

(Resp. App. 213a-214a.)

The trial court concluded that

> Plaintiffs' evidence established a *prima facie* case of classwide disparate treatment of women applicants and deterred applicants, which was not rebutted by defendants. . . .
>
> Defendants' consistent discriminatory treatment of female applicants, method of publicizing trainee agent positions, recruitment practices, negative responses to inquiries by women regarding sales positions, and the predominantly male composition of defendants' managerial force, operated to discourage and deter potential female applicants for trainee agent positions.

(Resp. App. 271a.)

C. Imposition Of Sanctions On Petitioners and Their Counsel For Delay and Discovery Abuse

Pretrial discovery was unusually difficult. Prior to the Stage I class liability trial, "Plaintiffs were required to obtain nine separate Orders compelling Discovery, and the Court was required to hold special monthly discovery conferences to manage the litigation." *Kraszewski v. State Farm General Ins. Co.*, 36 Fair Empl. Pract. Cases (BNA) 1354, 1355-56 (N.D. Cal. 1983). (Resp. App. 21a.) Petitioners' obstruction of discovery caused the trial to be rescheduled from May 1981 to March 1982. Despite these orders and the time-consuming supervision of the district court, petitioners continued to refuse to provide the discovery ordered produced by the court. Petitioners' contumacious failure to provide discovery became clear at trial when petitioners attempted to offer in evidence the very documents that counsel for petitioners, in response to discovery requests, had earlier insisted did not exist. This caused the district court to appoint a Special Master to review all discovery matters and to make recommendations to the Court. (Resp. App. 22a.) After the Special Master issued a report and recommendations, and the parties had an opportunity to comment, the court made findings and imposed on petitioners a total of $439,858.42 in monetary sanctions for discovery abuse. (Resp. App. 21a-97a.)

Plaintiffs-Respondents had requested in discovery all types of documents that would have identified class members prior to trial. (Resp. App. 24a-26a.) Respondents had also sought discovery of computerized databases, including information that would have identified class members. (Resp. App. 26a-27a.) During pretrial

discovery, petitioners maintained that such information did not exist, but in mid-trial on May 11, 1982, it became apparent that such documentation did exist, both in hard-copy and computerized formats. (Resp. App. 21a.) The district court found that petitioners and their counsel "failed to make a good faith effort" to produce such discovery, in violation of two court orders. (Resp. App. 25a-26a, 28a.) The trial court found that the tardy mid-trial production of these documents "caused plaintiffs substantial actual prejudice, by seriously undercutting plaintiffs' ability to identify and locate other class members." *Id.* The mid-trial production of discovery not only inhibited plaintiffs' ability to prepare for trial, it also delayed for nearly a year their access to class members and potential claimants. During that time, many class members may have relocated without forwarding addresses. The number of meritorious claims that subsequently were not filed because of this delay will never be known.

Petitioners' non-compliance with legitimate discovery requests was frivolous in the extreme, as noted with exasperation by the district court:

> Defendants' September 1981 objection to 59 of plaintiffs' 73 Interrogatories propounded in June 1981 were dilatory, frivolous and wholly lacking in substantial justification. *The defendants' basic position* with respect to 40 of the 59 unanswered interrogatories – that defendants would not answer the questions until plaintiffs produced 'credible evidence' to support the allegations underlying the questions – *was recognizable as an absurdity to anyone even passingly familiar with the American discovery process.*

(Resp. App. 35a.) (Emphasis added.)

The district court characterized petitioners' "overall pattern of discovery abuse" as constituting " 'flagrant bad faith' and 'callous disregard for their responsibilities' both to plaintiffs and to this Court." (Resp. App. 39a.) The court found both petitioners and their counsel guilty of civil contempt and noted that "there is strong evidence in this case of 'wilful disobedience' of court orders by defendants and their counsel which might have warranted a finding of criminal contempt . . . . " (Resp. App. 43a.) Rather than finding petitioners in criminal contempt, however, the district court fashioned remedies designed to ameliorate the harm caused by petitioners' misconduct. This remedial order, including $439,858.42 in monetary sanctions, was not appealed and was paid by petitioners and their counsel.[6]

D. Remedies Proceedings and The Claim Procedure Consent Decree

Following the resolution of the discovery sanctions issues and the rendition of the Stage I class liability decision, the parties filed cross motions regarding the appropriate Stage II remedy for individual victims of

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[6] In the Stage II claim procedure, petitioners have been sanctioned by the Discovery and Motion Special Master for additional failures to produce relevant discovery in a timely manner. The sanction imposed was an order that an essential element of claimant's case was deemed satisfied. Without this sanction order, the claim would have been dismissed. Instead, over $200,000.00 was recovered in this claim. Similar sanctions for late production of discovery have been imposed on petitioners in three additional claims which have yet to come to hearing.

class discrimination. "After lengthy oral argument and upon careful consideration of the extensive briefing," the trial court issued a remedies order which provided for an individualized claims procedure. (Resp. App. 274a.) The trial court determined that the goal at the remedy stage was to " 'make victims of unlawful employment discrimination whole' " (citing *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)), and that the *preferred* method of determining damages in Title VII cases is by using individualized hearings. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371-372 (1977).[7] (Resp. App. 275a.)

The trial court did not fashion the details of the individual claim procedure but, instead, directed the parties to negotiate the format for the Stage II proceedings.

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[7] Petitioners claimed that "special circumstances" warranted departure from the normal preference for individualized remedy proceedings. (Resp. App. 276a.) The trial court found, however, that the special circumstances of this case *favored* individualized proceedings. (Resp. App. 277a.) Unlike some Title VII remedies cases that had permitted the distribution of damages on a formula basis because many different job positions, promotions, evaluations, discipline, terminations, and/or work assignments were at issue, this case involves only one entry-level job position and two types of discrimination (recruitment and hire). (Resp. App. 277a-278a.) Moreover, in this case, plaintiffs-respondents agreed to the use of stipulated earnings, calculated by year, in order to make the back pay calculation simple. (Resp. App. 278a.) The trial court also considered the large monetary value of individual claims. With individual claims worth hundreds of thousands of dollars each, "the presumption in favor of individualized hearings would appear to be critical." (Resp. App. 279a.)

(Resp. App. 285a.) The parties took the court's directive seriously and over the course of eighteen months, negotiated and agreed to a 31-page Consent Decree Regarding Injunctive Relief and a 105-page Claim Procedure Consent Decree (supported and explained by approximately 400 pages of exhibits).

After the Rule 23 fairness hearing and extensive notices to the class, approximately 6,500 initial claims were filed. Initial claimants were required to pass an insurance aptitude test and two California insurance license tests. After testing of claimants and the weeding-out of defective claims, in late 1989 approximately 1,000 women filed final claims. These claims are now being settled and adjudicated by a group of nine Special Masters, including two former United States District Judges, the Honorable Charles B. Renfrew (who is the Chief Special Master) and the Honorable Raul A. Ramirez, one former California Supreme Court Justice, and six labor arbitrators with substantial Title VII experience. All the Special Masters and all the claim procedures were agreed to by petitioners.

The Claim Procedure Consent Decree permitted the issue of back pay liability to be presented to the district court to choose the appropriate back pay cutoff date. However, the parties expressly agreed in the Decree that back pay "shall be calculated to the date of judgment, except as otherwise provided in this Decree, as set forth in Exhibit 9." Section VII.G.4.e; Claim Procedure Consent Decree at 59:18-21. (Resp. App. 289a.) Exhibit 9 states that, "[u]nder this Decree, entitlement to damages can arise only on one of five dates ('Entitlement Dates')." (Resp. App. 289a.) These five "Entitlement Dates" are (1)

the date petitioners settle an individual claim for full value; (2) the date petitioners settle multiple claims for full value; (3) the date on which a claim is settled for less than full value; (4) the date of judgment on an individual claim by a Hearing Master; or, if an appeal is taken from an individual claim judgment; (5) the date of the written decision by the Chief Special Master. Decree Exhibit 9 at 12:21-13:26. (Resp. App. 294a-295a.) For all judgments and automatic settlements, Exhibit 9 clearly provides that "back pay shall be calculated to the Entitlement Date . . . . "[8] Exhibit 9 at 13:27-15:24. (Resp. App. 295a-296a.) Thus, the Claim Procedure Consent Decree *expressly* provides that back pay "shall be calculated to the date of judgment." The date now proposed by petitioners for cutting off back pay, the date of final approval of the Consent Decree (March 15, 1988), is not a permitted date under the Decree. Petitioners simply bargained away the remedy they now seek from this Court.

Despite the express terms of the Claim Procedure Consent Decree, petitioners subsequently filed a motion with the district court requesting that back pay be cut-off on the date of the Consent Decree, rather than as of the date of individual claim judgment, as provided by the Consent Decree. The district court decided the back pay issue based on its careful review of the specific facts of the case and the application of Title VII law to those facts.[9] The district court recognized that "the clear thrust

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[8] The only exception to this rule is for "negotiated settlements."

[9] The trial court declined to rule on the Exhibit 9 Decree issue, stating simply that "we are not experts on the *Kraszewski* Consent Decree." (Pet. App. A-19.)

of Title VII remedial law is to award back pay until the date of final judgment." (Pet. App. A-13.) However, this did not end the district court's analysis. The district court carefully considered each contention advanced by petitioners in order to determine whether its discretion should have been exercised in favor of early termination of back pay. (Pet. App. A-13-20.) Only after considering each of petitioners' claims did the district court apply the general remedial rule of back pay to the date of individual judgment.[10] The Ninth Circuit subsequently described the district court's opinion as an "extremely thorough, thoughtful and well-reasoned" one which "weigh[ed] all the interests involved and balanc[ed] them carefully." (Pet. App. A-3.)

On review, the Ninth Circuit recognized that "Title VII grants a district court broad discretion to formulate a remedy for victims of unlawful discrimination." (Pet. App. A-8.) In response to petitioners' claims that discretion had not been exercised, the Ninth Circuit held that, "the district court carefully considered a number of reasons proferred by State Farm for departing from the general rule of awarding back pay until judgment and, after weighing all the facts and circumstances, found those reasons not to be compelling . . . Here, having determined in his discretion – which must be guided by prior Title VII rulings – that State Farm's reasons were

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[10] The district court actually awarded less than full back pay, as it deducted one year for institutional delay caused by the district judge's illness. (Pet. App. A-18-20.)

not compelling, the district court properly applied the general rule." *Id.*[11]

REASONS FOR DENYING THE WRIT

I

THE "QUESTION PRESENTED" IN THE PETITION IS NOT IN CONTROVERSY IN THIS CASE

The sole question presented by the petition is:

> At the remedies phase of an employment discrimination class action, do district courts have discretion to provide for the accrual of back pay for individual class members as seems appropriate in light of the facts and circumstances of the case?[12]

Petitioners argue that such discretion should exist, and suggest that the courts below held to the contrary. In fact, however, both the court of appeals and the district court accepted petitioners' contention that district courts enjoy discretion in determining when the period of back pay liability should end. Petitioners lost below, not because the lower courts concluded there was no such discretion,

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[11] The Ninth Circuit found error only in the district court's deduction of back pay for the district judge's illness. The Ninth Circuit held that *NLRB v. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 264-66 (1969), *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), and *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 (1976) require that the costs of delay not attributable to either the employer or the employee are to be borne by the wrongdoing employer, not the wronged employee. (Pet. App. A-8.)

[12] Petition at 1.

but because the district court, in the exercise of that discretion, rejected the liability cut-off date that had been urged by petitioners. Thus, the question proposed by the petition simply is not in controversy in this case.

The district court did not hold, as petitioners suggest, that it was compelled to utilize the cut-off date urged by respondents regardless of "the facts and circumstances of the case." On the contrary, the district court's decision contains a detailed discussion of just those facts and circumstances, carefully analyzing each argument advanced by petitioners. (Pet. App. A-13 to A-18.) The district court recognized that the decision necessarily involved an exercise of "our equitable power." (Pet. App. A-11.) The trial judge described some of the issues raised by petitioners' arguments as

> subtle, interesting, and not easy to resolve. However, on balance we agree with plaintiffs.[13]

Although the district judge recognized that most reported Title VII cases supported the cut-off date advanced by respondents, the judge did not regard that as conclusive. On the contrary, the judge indicated a willingness to depart from that general practice if petitioners could "advance compelling reasons" for doing so. (Pet. App. A-13.)

Petitioners lost not because the trial court believed it lacked discretion to set the earlier cut-off date urged by petitioners, but because the district court simply found unpersuasive petitioners' arguments for exercising its

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[13] (Pet. App. A-14.)

discretion in that manner. Petitioners assert that the district court held that

> absent compelling circumstances . . . its equitable discretion [was] confined by case law that virtually compel[led] full accrual.

(Pet. App. A-11.)[14]

The passage which petitioners quote, however, is not from the holding of the district court, but from the court's summary of the *contentions of trial counsel*. The full quotation, before the ellipsis, reads:

> *Plaintiffs* agree that the Court's power is equitable, but *argue vigorously* that our equitable discretion is confined by case law that virtually compels full accrual.

(Pet. App. A-11.) (Emphasis added.)

Petitioners describe the district court as having issued an

> order ('June 8 Order'), ruling that Title VII did not permit the exercise of the 'wide discretion' that the Supreme Court had authorized in *Albemarle Paper Co. v. Moody*.

(Pet. 4.)

In fact, there is no such "ruling" in the district court's Order.

Petitioners assert that the court of appeals announced a "compelled,"[15] "rigid rule"[16] regarding the cut-off date for back pay liability, deliberately stripping the district court of any discretion on this issue. On the contrary, the

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[14] (Pet. 4.)

[15] (Pet. 5.)

[16] (Pet. 6.)

Ninth Circuit expressly recognized that a "district court's calculation of a back pay award is reviewed only for an abuse of discretion." (Pet. App. A-4.) The district court's decision was sustained, not because the appellate court held it was compelled by a "rigid rule," but because the circuit court concluded that "the district judge did not abuse his discretion." (Pet. App. A-4.)

The court of appeals expressly rejected petitioners' suggestion that the district court might have thought itself controlled by any such rigid rule:

> Title VII grants a district court *broad discretion* to formulate a remedy for victims of unlawful discrimination. State Farm argues that in this case the district judge failed to exercise his discretion. It claims that the judge concluded he was required to rule for plaintiffs. State Farm simply misreads the district judge's opinion. The district court carefully considered a number of reasons for departing from the general rule of awarding back pay until judgement and, after weighing all the facts and circumstances, found those reasons not compelling.

(Pet. App. A-8.) (Emphasis added.)

II

THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR WITH DECISIONS OF OTHER COURTS OF APPEALS

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), this Court held that the fashioning of a back pay remedy for a Title VII violation involved the exercise of equitable discretion. 422 U.S. at 421. Both courts below properly recognized the existence of that discretion. The particular

manner in which that equitable discretion was exercised by the courts below is entirely consistent with *Albemarle*. *Albemarle* emphasized that the remedial sections of Title VII were "intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible." In *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), this Court reiterated that remedial orders should be framed "to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case."[17] 424 U.S. at 770-771.

The decisions below, providing that the back pay owed to each claimant shall run until the date on which the court determines the merits of her particular claim, is entirely consistent with *Albemarle* and *Franks*.[18] No

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[17] Petitioners cite *Library of Congress v. Shaw*, 478 U.S. 310 (1986), for the proposition that interest alone compensates for the delay in receiving back pay. The *Library of Congress* case, however, is not a back pay case at all; it is an attorneys' fees case whose holding is based on sovereign immunity, not Title VII remedies law. In fact, the holding in *Library of Congress* is directly contrary to the purpose for which petitioners assert it, as interest was *denied*.

[18] This Court has made clear that the burden of institutional delay must be placed on the lawbreaker, not the victim. *NLRB v. Rutter-Rex Manufacturing Co., supra*. In *Rutter-Rex*, the NLRB had taken five years to file its back pay specification for 600 claimants. This Court noted that the purpose of back pay is to make employees whole for economic losses and concluded that back pay could not be limited due to delay in processing claims. The Supreme Court stated that, "[T]he Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees." 396 U.S. at 264. In this

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individual claimant has the right to any relief until she obtains an individual judgment or settlement. The date of that judgment or settlement is the date on which State Farm's discriminatory practices will have been remedied for her.

The practice in all ten of the circuits to consider this issue has been to approve continuation of back pay liability until the date when a plaintiff's individual claim has been finally and fully adjudicated. *See, e.g., Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465, 473 (D.C. Cir. 1987) (compensation for period of time until "judgment entered on her Title VII action" is a "permissible award of back pay"); *Kyriazi v. Western Electric Co.*, 465 F. Supp. 1141, 1156-57 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981) ("The 'cutoff' date for back pay shall be the date of entry of final judgment"); *EEOC v. Korn Industries, Inc.*, 662 F.2d 256, 263 (4th Cir. 1981) (It was error for the district court to cut off back pay liability on an arbitrary date prior to judgment); *Cheschein v. Liberty Mutual Insurance Co.*, 713 F.2d 1142, 1150 (5th Cir. 1983) (It was proper

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case, the institutional delay has been caused by petitioners' abuses of the discovery process, their decision to engage in an eleven-month long liability trial, the law's preference for individual damage proceedings, and petitioners' *agreement* to an individualized claim procedure.

Rutter-Rex is directly applicable to this case because this Court has consistently held that the basic principles developed under NLRA guide courts in tailoring remedies under Title VII. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 226 n.8 (1982); *Teamsters*, 431 U.S. at 366-67; *Franks*, 424 U.S. at 768-70; *Albemarle*, 422 U.S. at 419.

for district court to terminate back pay period as of "entry of final judgment"); *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1158-59 (6th Cir. 1985) ("victorious Title VII plaintiffs are presumptively entitled to back pay until the date judgment is entered in the case"); *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599 (7th Cir. 1985) ("judgment in her favor"); *Paxton v. Union National Bank*, 688 F.2d 552, 574 (8th Cir. 1982) ("to the present"); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1136 (9th Cir. 1986) ("date of final judgment"); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979) ("date of judgment"); and *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1473 (11th Cir. 1985) ("date of judgment").

Petitioners claim that the Ninth Circuit's decision in favor of back pay to judgment conflicts with *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977), and claim that the Ninth Circuit "simply ignored" *Stewart*. (Pet. 8:) Neither claim is accurate. The Ninth Circuit expressly discussed the *Stewart* decision.[19] The actual terms of the 1976 decision

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[19] The Ninth Circuit discussed *Stewart* as follows:

> The second case State Farm cites is *Stewart v. General Motors Corp.*, 542 F.2d 445, 454 (7th Cir. 1976), *cert. denied*, 433 U.S. 919, 97 S.Ct. 2995, 53 L.Ed.2d 1105 (1977), in which the court, without explanation, provided for the termination of back pay on the date the district court entered its decree. The opinion does not reveal whether or not this was the termination date the plaintiffs requested or even whether plaintiff agreed or disagreed with the date ordered by the court. In any event, we agree with the district court

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in *Stewart*, moreover, do not purport to forbid, under appropriate circumstances, an award of back pay running to the date of judgment.[20]

Since this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the case which established the strong preference for individual remedy proceedings, the Seventh Circuit has awarded back pay to judgment, as have the other circuits. In *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599 (7th Cir. 1985), the Seventh Circuit reversed a district court for failing to award complete back pay from the date of plaintiff's termination to the date of "judgment in her favor." *Id.* at 607 n.14. It is noteworthy that the Seventh Circuit in *Horn* did not consider *Stewart* to be a contrary holding, and, indeed, cited *Stewart in support* of its back pay to judgment order. *Id.* at 607. Likewise, in *Daniels v. Essex Group*, 740 F. Supp. 553 (N.D. Ind. 1990),

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> below that *Stewart*, which was decided before *Teamsters* and most of the other relevant cases, is not in line with present authority.

(Pet. App. A-7.)

[20] *Stewart* is not in conflict with the back pay to judgment award in this case because it is not clear in *Stewart* when the "actual remedying of discrimination" actually occurred. The injunction issued in *Stewart* could have remedied the discrimination that affected the individual plaintiffs and class members so that losses of back pay did not continue to accrue. Under such circumstances, continued back pay would not have been appropriate.

the district court interpreted Seventh Circuit authority to support the award of back pay to judgment.[21]

Petitioners never sought to appeal the district court's order in favor of individual hearings. Instead, petitioners entered into the Claim Procedure Consent Decree which not only establishes an individual hearing procedure, but also sets forth a specific schedule for claim hearings. This schedule is being exceeded, and the claim procedure is running *ahead* of the schedule agreed to by petitioners. Consequently, whatever the delay involved in providing individual remedies for victims, it has been agreed to by petitioners and is not at issue in this petition.

CONCLUSION

Petitioners object that the individual hearings will take years, but petitioners did not appeal the order for such hearings and they expressly agreed to the very schedule about which they now complain. Petitioners object that the decision below is going to cost them a lot

[21] In so ruling, the court cited a Ninth Circuit case, *Thorne v. City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986) and *EEOC v. Monarch Machine Tool Co.*, 737 F.2d 1444 (6th Cir. 1980) for the proposition that, "Back pay is to run from the date of plaintiff's termination until the date of final judgment." *Daniels*, 740 F. Supp. at 561. Both of these cases were cited by the Ninth Circuit in this case in reaching the same conclusion. Consequently, not only does the Seventh Circuit *not* interpret *Stewart* as a holding in conflict with an award of back pay to judgment, but district courts within the Seventh Circuit cite Ninth Circuit cases to support the same proposition petitioners are challenging herein. This is hardly the essence of a circuit conflict.

of money. (Pet. 10-11.) Petitioners do indeed face substantial financial liability, but the responsible parties are neither the district judge nor the court of appeals. For more than a decade after the adoption of Title VII, petitioners engaged in systematic and blatant discrimination on the basis of sex. Over a thousand highly qualified women were denied equal employment opportunities while less qualified men were given lucrative positions often paying in excess of $100,000 a year. These women are now recovering individual judgments and settlements at a rate that exceeds the claim hearing schedule agreed to by State Farm in the Claim Procedure Consent Decree. They also are recovering back pay to the dates of individual judgments, as called for by *Albemarle* and its progeny, and by the terms of the Claim Procedure Consent Decree. There is no reason to excuse petitioners from these terms to which they long ago agreed or from the back pay rule that has been accepted by this Court and all ten circuits that have ruled on this issue.

The "question presented" by petitioners is not, in fact, in controversy, and there is no circuit conflict. The Claim Procedure Consent Decree is operating exactly as it was designed to operate and exactly as agreed to by

petitioners. The petition for writ of certiorari should be denied.

Respectfully submitted,

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March 1991

APPENDIX

KRASZEWSKI v. STATE FARM INS. CO.

U.S. District Court,
Northern District of California

KRASZEWSKI, et al. v. STATE FARM GENERAL INSURANCE COMPANY, et al., No. C 79-1261 TEH, September 9, 1981

Full Text of Opinion

HENDERSON, District Judge: – This matter came on for hearing on January 19, 1981, pursuant to plaintiffs' motion for provisional class certification, and was taken under submission. The Court having considered the lengthy papers of both parties, heard oral argument, and good cause appearing,

IT IS HEREBY ORDERED that plaintiffs' motion for provisional class certification be granted.

I. Statement of Facts

The above captioned action is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., as amended, by three individuals on behalf of themselves and other women applicants for State Farm Sales Agent Trainee positions in the State of California. Plaintiffs Muriel E. Kraszewski, Daisy O. Jackson, and Wilda Tipton allege that defendants State Farm General Insurance Company, State Farm Mutual Automobile Insurance Company, State Farm Life Insurance Company and State Farm Fire and Casualty Company ("State Farm") have discriminated against them and other members of the

alleged class on the basis of sex in the recruitment, hiring and training of Sales Agent Trainees.

In the instant motion, plaintiffs seek an order from this Court permitting this action to proceed on behalf of the following class:

all female applicants and deterred applicants who, at any time since July 5, 1974, have been or continue to be or may in the future be denied appointment, employment and/or training as Sales Agent Trainees by defendant companies within the State of California.

II. The Legal Standard

According to Rule 23(a) of the Federal Rules of Civil Procedure, a plaintiff may not sue on behalf of a class unless 1) the class is so numerous that joinder of all its members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims of the representative parties are typical of those of the class; and 4) the representative parties will fairly and adequately protect the interests of the class. See also East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395, 14 FEP Cases 1505 (1977); Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 16 FEP Cases 316 (9th Cir. 1977).

In addition to the prerequisites listed above, one of three elements under Rule 23(b) must be present before a class can be certified. In the instant case, Rule 23(b)(2) requires plaintiff to establish that the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Fed.R.Civ.P. 23(b)(2).

The burden of establishing that the requirements of Rule 23 are met rests with the plaintiff who is seeking to have a class certified. Doninger v. Pacific Northwest Bell, 564 F.2d at 1308. To carry that burden, plaintiff must make a minimal showing of facts which support the existence of the criteria delineated in Rule 23. Doninger v. Pacific Northwest Bell, 564 F.2d at 1309.

However, to obtain class certification plaintiffs need not prove a prima facie case on the merits or convince the court that they will triumph on the merits at trial. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 2153, 9 FEP Cases 1302 (1974). As Judge Wisdom stated in Miller v. Mackey International, 452 F.2d 424, 427 (5th Cir. 1971),

> . . . the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.

III. Plaintiffs Have Met the Requirements of Rule 23(a)

The court is convinced that the plaintiffs in the instant case have satisfied all of the requirements Rule 23(a) imposes for class certification.

a. Numerosity

As noted above, the first of these requirements specifies that a class action may be maintained only if "the class is so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). Neither the case law nor the rule itself adequately defines what constitutes numerosity. Jurists and legal scholars who have grappled

with this prerequisite have stated only that the determination of numerosity depends upon the facts in a given case and not simply a head count. Harriss v. Pan American World Airways, Inc., 74 F.R.D. 24, 45, 15 FEP Cases 1640 (N.D. CA. 1977); 7 Wright and Miller, Federal Practice and Procedure §1762. Despite the reluctance of many to quantify the numerosity requirement, a survey of recent cases indicates that classes of less than thirty rarely will satisfy the numerosity requirement and those of a hundred or more most certainly will. 7 Wright and Miller Federal Practice and Procedure §1762; Schlei and Grossman, Employment Discrimination Law, 1979 Supplement at 279. Sagers v. Yellow Freight System, Inc., 529 F.2d 721, 12 FEP Cases 961 (5th Cir. 1976).

In the instant case, plaintiffs contend that the figure of 416 women who formally completed the application process (minus the 47 who were hired) easily satisfies the numerosity requirement. We agree. Defendants cite no case, and we are aware of none, in which joinder was considered practicable for a class of comparable size. Indeed, courts routinely have acknowledged the existence of numerosity even when far fewer people were involved. Gay v. Waiters' and Dairy Lunchmen's Union, 549 F.2d 1330, 14 FEP Cases 995 (9th Cir. 1977); Cullen v. U.S., 372 F.Supp. 441 (D.C. Ill. 1974); Beckerman v. Sands, 364 F.Supp. 1197 (D.C. N.Y. 1973).

Defendants' only retort to plaintiffs' showing of numerosity is that those women who completed the application process were not discriminated against. But that is not at issue at this point in the proceedings. As noted earlier, in ruling upon a motion for class certification, the Court is not empowered to conduct a mini-trial

on the merits of the case. East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395, 14 FEP Cases 1505 (1977). Its only job is to determine whether plaintiffs have satisfied the criteria of Rule 23. And with respect to numerosity, this Court has no doubt that plaintiffs' showing of some several hundred plaintiffs demonstrates that joinder is impracticable and a class action essential.

b. Commonality

Likewise, the Court is convinced that plaintiffs have met the commonality requirement of Rule 23(a)(2). That section provides that "questions of law or fact common to the class" must exist before the action can go forward on a class basis. It does not require that all questions of law and fact involved in the dispute be common to all members of the class. Martinez v. Bechtel Corp., 11 FEP Cases 898 (N.D. Cal. 1975).

In the absence of a more detailed statutory definition of commonality, Judge Schwarzer has provided in Harriss v. Pan American World Airways, 74 F.R.D. 24, 41, 15 FEP Cases 1640 (N.D. Cal. 1977), a list of pertinent criteria to consider:

(i) What is the nature of the unlawful employment practice charged – is it one that peculiarly affects only one or a few employees or is it genuinely one having a class-wide impact.

(ii) How uniform or diverse are the relevant employment practices of the employer, considering matters such as: size of the work force; number of plants and installations involved; extent of diversity of employment conditions, occupations and work activities; degree of geographic dispersion of the employees and of intra-company employee transfers and interchanges; degree of

decentralization of administration and supervision as opposed to the degree of local autonomy.

(iii) How uniform or diverse is the membership of the class, in terms of the likelihood that members' treatment will involve common questions.

(iv) What is the nature of the employer's management organization as it relates to the degree of centralization and uniformity of relevant employment and personnel policies and practices.

(v) What is the length of the time span covered by the allegations, as it relates to the degree of probability that similar conditions prevailed throughout the period.

Under the methodology proposed by Judge Schwarzer, there is little doubt that commonality exists. First, as plaintiffs point out in their reply brief, the nature of the alleged discrimination is one which affects not one or few employees, but instead, at least hundreds. Second, the alleged discriminatory impact is the product of a uniform recruitment, selection, and training procedure. Third, class membership is very homogeneous, consisting only of women who have applied, or were deterred from applying, for a single type of job. Fourth, the management structure which has determined and controlled the above employment practices is highly centralized and uniform, the procedure having been developed and overseen by corporate headquarters and regional vice-presidents. Fifth, the time period covered by the allegations is five years, and there has been no suggestion that during this period relevant employment practices varied.

The existence of common questions is clear according to not only Judge Schwarzer's formulation, but also others within use in this district. In Martinez v. Bechtel, 11 FEP Cases 898, 903 (N.D. Cal. 1975), for example,

Judge Williams found common questions based upon allegations of discrimination plus statistical evidence indicating that few women are employed by defendants in the position in question. Plaintiffs in the instant case have supplied both. Similarly, in Walthall v. Blue Shield of California, 16 FEP Cases 626, 628 (N.D. Cal. 1977), and Ellis v. Naval Air Rework Facility, 404 F.Supp. 391, 396, 13 FEP Cases 1782 (N.D. Cal. 1975), Judges Wollenberg and Orrick, respectively, held that Rule 23(a)(2) is satisfied by common discriminatory employment practices or the common threat of discrimination towards all members of the class. We have no doubt that plaintiffs' allegations that State Farm engages in a policy of sex discrimination in the recruitment and hiring of Trainee Agents in the State of California meet the standard enunciated in these cases as well.

In contrast, defendants' argument that commonality is lacking is unpersuasive. Defendants contend that no common questions are involved because decisions regarding the hiring and training of Trainee Agents are made individually by agency managers in different parts of the state and under diverse circumstances. Defendants' argument fails for several reasons. First, as suggested earlier, commonality does not require the existence of identical fact patterns with respect to every member of the class. Wright and Miller, Federal Practice and Procedure, §1763 at 603 (1969). Second, the fact that members of the class are spread out geographically is by no means fatal to commonality. As plaintiffs point out, certification of geographically broad classes is commonplace. See, e.g., Bernardi v. Bergland, 18 FEP Cases 1180 (N.D. Cal. 1977); Alaniz v. California Food Processors, Inc., 73 F.R.D. 269,

13 FEP Cases 720 (N.D. Cal. 1976). Finally, in view of plaintiffs' allegation that discrimination is company wide, any question as to whether discrimination against women is individually practiced or company policy is a question to the claims of the class. Martinez v. Bechtel, 11 FEP Cases at 903.

c. Typicality

In addition to numerosity and commonality, Rule 23 demands that plaintiffs demonstrate that their claims are typical of those of the members of the class. Fed.R.Civ.P. 23(a)(3). Plaintiffs have surmounted this hurdle, too.

Like its 23(a) counterparts, the typicality requirement has sometimes suffered from a lack of precision. The Supreme Court has stated merely that typicality is satisfied if class representatives " 'possess the same interest and suffer the same injury' as the class members." East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 14 FEP Cases 1505 (1977). Judge Renfrew added some much needed precision to this definition in Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 18 FEP Cases 1645, 1666 (N.D. Cal. 1978), in which he stated that typicality does not require plaintiffs' claims to be factually identical with those of the remaining class members, but simply that they "arise out of the same remedial and legal theory."

In the instant case, plaintiffs Kraszewski and Tipton allege that they were discouraged by defendant from applying for, and were denied, positions as Sales Agent Trainees, solely on the basis of their sex. For purposes of bringing a class action, their claims must be viewed as

typical of those of the proposed class who, at any time since July 5, 1974, have been or continue to be or may in the future be denied appointment, employment and/or training as Sales Agent Trainees by State Farm within the State of California. The interests of these two plaintiffs and the members of the class are sufficiently parallel to foster the effective presentation of all potential claims for relief which Rule 23(a)(3) seeks to ensure. Wofford v. Safeway Store, Inc., 18 FEP Cases at 1666.

Whether typicality exists is not as easily resolved with respect to plaintiff Jackson. Unlike Kraszewski and Tipton, Jackson eventually obtained a position as a Sales Agent Trainee, although plaintiffs allege that originally she was discouraged from doing so. Because Jackson did apply, and gained an appointment, defendants assert that her claims cannot be considered typical of those of the proposed class. We disagree.

Defendants are correct in stating that Jackson's claim is not as closely aligned with members of the class as are those of the other plaintiffs; but that is not dispositive. Factual dissimilarities are not fatal to typicality when, as in the instant case, the representative's claim arises from the same course of conduct of legal theory as the claims of other class members. Smith v. B. & O. Railroad Co., 473 F.Supp. 572, 102 LRRM 2109 (D.C. Md. 1979). Nor do the authorities defendants cite prove otherwise. Robbins v. O'Brien Corp, 14 FEP Cases 934 (N.D. Cal. 1977) is distinguishable on its facts and Piva v. Xerox Corp., 70 F.R.D. 378, 11 FEP Cases 1259 (N.D. Cal. 1976), a case much like our own, supports rather than opposes a finding of typicality here.

In Piva, a former employee who had been discharged by defendant Xerox, sought to represent a class of past, present and future employees who have been, are being, or may in the future be discriminated against on the basis of sex in any of a number of ways, including recruiting and hiring. Piva v. Xerox Corp., 70 F.R.D. at 381-382. Like Jackson's claims, plaintiff Piva's were not identical with those of all members of the proposed class. Nonetheless, Judge Sweigert concluded that she had satisfied the prerequisite of typicality. Citing the importance of the broad remedial public policy of Title VII, as recognized by the Supreme Court and Congress, Judge Sweigert emphasized that the typicality requirement should be liberally construed in order to enable a Title VII plaintiff to "challenge employment practices which are related to but not indentical to the practices which directly affected the plaintiff individually." Piva v. Xerox Corp., 70 F.R.D. at 388. We share Judge Sweigert's reasoning and believe that it is wholly applicable to the situation of Plaintiff Jackson in the instant case.

d. Adequacy of Representation

The fourth and final condition of Rule 23(a) with which plaintiffs must comply is that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This requirement of adequate representation is important because the judgment on the merits plaintiffs obtain will determine with finality the rights of numerous absent class members. See Hansberry v. Lee, 61 S.Ct. 115 (1940).

We are aware of no better statement of the ingredients which go into adequate representation than that espoused by Judge Medina in Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968). In a well-reasoned discussion, Judge Medina numbered three factors as crucial: 1) competence of plaintiffs' counsel; 2) absence of collusion; and 3) absence of antagonistic interests between the representatives and remaining members of the class. Eisen v. Carlisle & Jacquelin, 391 F.2d at 562-563. We would add that the Ninth Circuit recently adopted much the same criteria. Social Services Union v. County, 609 F.2d 944, 21 FEP Cases 684, 685-686 (9th Cir. 1979).

A careful review of the record confirms that plaintiffs adhere to all three and, consequently, are adequate representatives. First, defendants do not dispute, and we are convinced, that plaintiffs' counsel have the necessary expertise and experience to prosecute this litigation. Second, defendants do not offer any evidence of, and we are aware of none, which would suggest the presence of collusion. Third, and finally, we have no reason to believe that the interests of the representative plaintiffs are in any way antagonistic to those of other members of the class. Defendants' contention that plaintiffs are unsatisfactory representatives because their interests in future job opportunities at State Farm are contrary to the interests of class members in the same jobs is novel, but unconvincing. As plaintiffs point out, defendants' claim is merely speculative, and therefore insufficient to demonstrate the type of actual conflict required by the Ninth Circuit before it will deny the existence of adequate representation. Social Services Union v. County, 21 FEP Cases at 687.

Furthermore, as plaintiffs also explain, were defendants' contention accepted, Title VII class certification motions would invariably fail because representative plaintiffs and class members always are in competition for a limited number of job openings.

For these reasons, we find that plaintiffs are adequate representatives of the proposed class, and as a result, that plaintiffs have met all of the conditions posed by Rule 23(a) for class certification.

IV. Class Certification is Warranted Under Rule 23(b)(2)

Having satisfied all of the prerequisites of Rule 23(a), plaintiffs must also pass the standard of Rule 23(b)(2). That is, they must demonstrate that

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . . Fed.R.Civ.P. 23(b)(2)

Plaintiffs have made such a showing.

As noted earlier, plaintiffs have brought this action on behalf of themselves and other women applicants for Sales Agent Trainee positions to challenge alleged sex discrimination by defendants in recruiting, hiring, assignment and training. They seek declaratory, injunctive, and monetary relief. As such, plaintiffs have alleged the two elements which Rule 23(b)(2) expressly requires: that defendants have acted in a manner "generally applicable to the class" and that injunctive or corresponding declaratory relief is sought as a remedy. Fed.R.Civ.P. 23(b)(2);

Wright and Miller, Federal Practice and Procedure, §1775 at 19; Doninger v Pacific Northwest Bell, Inc., 564 F.2d at 1313.

The fact that plaintiffs seek monetary relief in addition to an injunction and declaration does not prevent certification under Rule 23(b)(2). Although it is true that Rule 23(b)(2) is inapplicable when the relief sought is wholly or predominantly damages, McDonnell Douglas Corp. v. U.S. District Court, C.D. of Cal., 523 F.2d 1083 (9th Cir. 1975), Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 16 FEP Cases 316, it remains appropriate when the primary remedy is an injunction. Senter v. General Motors Corp., 532 F.2d 511, 12 FEP Cases 451 (6th Cir. 1976), cert. denied, 429 U.S. 870, 97 S.Ct. 182, 13 FEP Cases 963; Harriss v. Pan American World Airways, Inc., 74 F.R.D. at 46. In the instant case, no evidence has been presented beyond the bare assertion of defendants that would indicate that monetary relief is paramount. And the latter is insufficient reason for denying certification under Rule 23(b)(2).

V. Conclusion

Accordingly, this Court finds that plaintiffs have satisfied all of the requirements of Rules 23(a) and (b), and as a result may maintain this action as a class action on behalf of themselves and all other female applicants and deterred applicants who, at any time since July 5, 1974, have been or continue to be or may in the future be denied appointment, employment and/or training as

Sales Agent Trainees by defendant companies within the State of California.

SO ORDERED.

KRASZEWSKI v. STATE FARM INS. CO.

U.S. District Court,
Northern District of California

KRASZEWSKI, et al. v. STATE FARM GENERAL INSURANCE COMPANY, et al., No. C 79-1261 TEH, November 16, 1982

Full Text of Opinion

HENDERSON, District Judge: – On September 9, 1981, the Court provisionally certified the above-captioned action as a class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2). Defendants have moved the Court for reconsideration of the class certification, in light of the recent decision in General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 28 FEP Cases 1745 (1982) [hereinafter referred to as "Falcon"]. The Court having considered the papers filed by both parties, and good cause appearing, for the reasons hereinafter stated,

IT IS HEREBY ORDERED that defendants' motion is denied.

STATEMENT OF THE FACTS

Plaintiffs Muriel E. Kraszewski, Daisy O. Jackson and Wilda Tipton bring this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended, against defendants State Farm General Insurance Company, State Farm Mutual Automobile Insurance Company, State Farm Life Insurance Company, and State Farm Fire and Casualty Company [hereinafter "State Farm"].

Plaintiffs allege that defendants have discriminated on the basis of sex in the recruitment, hiring and training of State Farm Sales Agent Trainees in the State of California. Accordingly, plaintiffs sue on behalf of themselves and other women applicants and deterred applicants seeking this job.

All three individual plaintiffs allege that defendants discouraged them from applying for the job of Sales Agent Trainee. In spite of this alleged discouragement, all three applied. Plaintiffs Kraszewski and Tipton were unsuccessful applicants; plaintiff Jackson was a successful applicant, but was unsuccessful in her attempt to graduate from the job of Trainee Agent to that of Career Sales Agent.

The class provisionally certified by the Court and represented by the three individual plaintiffs includes:

all female applicants and deterred applicants who, at any time since July 5, 1974, have been or continue to be or may in the future be denied appointment, employment and/or training as Sales Agent Trainee by defendants within the State of California.

Thus far, after 46 days of trial, the Court has heard both statistical and anecdotal evidence regarding the alleged disparate treatment of and impact on women of State Farm's recruiting, hiring and training practices. The statistical evidence has been relevant both to the individual plaintiffs' claims and to the class claims. Likewise, the anecdotal evidence has been relevant both to the individual plaintiffs' claims and to the class claims.

LEGAL STANDARD

The full discussion of the requirements of Rule 23(a) which appears in the Court's September 9, 1981 Order provisionally certifying the class in this case, Kraszewski v. State Farm Ins. Co., 27 Fair Empl. Prac. Cas. (BNA) 27 (1982) is hereby incorporated by reference. In brief, the Rule 23(a) requirements are: numerosity, commonality, typicality, and adequacy of representation.

Application of Standard To Facts

Defendants challenge the commonality and typicality of the individual plaintiffs in this action. As the Supreme Court has observed, the commonality and typicality requirements tend to merge, since the primary purpose of Rule 23(a) is to determine

> whether the individual plaintiffs' claims and the class claims are so interrelated that the interests of the class members will be fairly and *adequately protected* in their absence.

Falcon, 102 S.Ct. at 2371 n. 13 (emphasis added); See Kraszewski, 27 Fair Empl. Prac. Cas. (BNA) at 31. Thus the key question under Rule 23(a) is *adequate representation*: do the named plaintiffs have sufficient commonality and typicality to ensure that he absent class members receive, albeit by proxy, their fair day in court?

Defendants contend that the individual plaintiffs' claims in this case are not sufficiently related to those of the class to ensure adequate protection of the absent class members. In particular, defendants contend that, under Falcon, none of the individual plaintiffs can adequately protect the interests of "deterred applicants," since all

three individual plaintiffs formally applied for the job of Sales Agent Trainee. We disagree.

In Falcon, an individual employee alleging discriminatory treatment in promotion with respect to a single job position purported to represent both employees and rejected applicants suffering discriminatory impact in promotions and in hiring for all jobs in defendant's control. Proof of the individual claim involved anecdotal evidence only while proof of the class claims involved statistical evidence only. Falcon, 102 S.Ct. at 2372. The Supreme Court held that, on those facts, automatic certification of an "across-the-board" class without any "specific presentation" identifying the questions of law or fact common to the individual claim and the class claims was improper because there was no showing of commonality and typicality as required by Rule 23(a). Falcon, 102 S.Ct. at 2371.

Falcon is factually distinguishable from the present case on at least three grounds. *First*, this is not an "across-the-board" case: whereas plaintiff in Falcon sought to certify a class for all job positions controlled by defendant, plaintiffs in this case seek certification of a class for only one job position – Sales Agent Trainee. *Second*, the types of evidence required to prove the individual and the class claims in this case are interrelated: whereas Falcon involved a clear delineation between the individual's anecdotally-proven disparate treatment case and the class's statistically-proven disparate impact case, plaintiffs in this case are using a mix of anecdotal and statistical evidence with respect to both disparate treatment and disparate impact to prove both the individual and class claims. Third, the locations of the discrimination alleged

in this case are much more closely related than those alleged in Falcon: whereas Falcon involved a loose mix of discrimination in promotion and discrimination in hiring, plaintiffs in this case allege discrimination in three interrelated steps on the way to becoming a Career Sales Agent – recruiting, hiring, and training.

More importantly, even if Falcon were not distinguishable on its facts, the class certification in this case is entirely consistent with the holding of Falcon regarding the commonality and typicality requirements. As the Supreme Court in Falcon expressly noted:

> If [an employer] use[s] a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test would clearly satisfy the commonality and typicality requirements of Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes.

Falcon, 102 S.Ct. at 2372 n. 15. In this case, a class which includes deterred applicants, unsuccessful applicants and employees is justified by the named plaintiffs' allegations of a general policy of discrimination manifested in entirely subjective decision-making processes in hiring and promotion practices. Moreover, the Court did not rely merely upon plaintiffs' allegations in certifying a class; provisional certification did not issue until after a "specific presentation" of documentary materials from plaintiffs identifying the common questions of law and fact among the individual claims and the class claims.

And at this point, after 46 days of trial, the Court is satisfied that the provisional certification was appropriate, because the vast bulk of evidence relevant to the individual claims has also been relevant to the class claims. Accordingly, defendants' motion must be denied.

KRASZEWSKI V. STATE FARM INS. CO.

U.S. District Court,
Northern District of California

KRASZEWSKI, et al. v. STATE FARM GENERAL INSURANCE COMPANY, et al., No. C 79-1261 TEH, June 9, 1983

Full Text of Opinion

HENDERSON, District Judge: – The discovery process in the above-captioned case was unusually protracted and dispute-ridden. Plaintiffs were required to obtain nine separate Orders Compelling Discovery, and the Court was required to hold special monthly discovery conferences to manage the litigation. After all this work before trial, the Court was dismayed to find on May 11, 1982 that a mid-trial recess was required to allow plaintiffs to gather information which defendants through their counsel should have provided during the discovery and pre-trial phases of the litigation. Accordingly, in our May 11, 1982 Order Regarding Defendants' Noncompliance with Discovery Orders, the Court reviewed defendants' abuses of discovery in connection with two earlier Orders Compelling Discovery – those of January 18, 1982 and February 12, 1982 – and then referred to the Magistrate the question of sanctions both for defendants' noncompliance with all three court orders and for defendants' failure to respond to the legitimate discovery requests underlying those orders.

This reference to the Magistrate of the sanctions question proved premature. Upon resuming trial after the information-gathering recess, the Court faced a series of evidentiary motions from plaintiffs seeking to exclude

various portions of defendants' evidence because of defendants' alleged noncompliance with the Court's earlier discovery and pretrail Orders. Mid-trial resolution of these matters appeared impractical. Accordingly, on August 5, 1982, the Court ordered "all pending evidentiary motions based on alleged violations of discovery orders" – and the sanctions questions implicit therein – referred to Special Master Professor Mary Kay Kane of the Hastings School of Law for full review, and for a report and recommendation regarding their disposition. In so referring the sanctions questions implicit in these motions, the Court effectively stayed consideration by the Magistrate of the earlier sanctions question referred to him, as no ruling has been entered nor has argument even been heard in this matter by the Magistrate.

In their briefs to the Special Master, the parties identified four pending evidentiary motions based on alleged violations of discovery orders:

(1) plaintiffs' July 24, 1982 motion to exclude the testimony of defense witnesses Hooker, Hunt and Smith due to defendants' failure through their counsel to produce prior to trial the Aptitude Index Battery Cards ["AIB Cards"] and declarations of Understanding maintained in defendants' California Regional offices;

(2) plaintiffs' July 24, 1982 motion to exclude the testimony of defense witnesses Hooker, Hunt and Smith due to defendants' failure through their counsel to produce prior to the discovery cut-off date the computerized list by name of minority and women AIB test-takers who took that test prior to April 19, 1978;

(3) plaintiffs' June 25, 1982 motion to exclude the report of defense witness Elizabeth Milrod due to defendants' failure through their counsel to list and produce the Milrod report in a timely fashion and in compliance with court orders;

(4) plaintiffs' June 8, 1982 motion to exclude the handwritten memorandum of defense witness Matt Madsen – Trial Exhibit 74 – due to defendants' failure through their counsel to list that memo as an exhibit prior to trial and in compliance with court orders. In addition, both parties briefed for the Special Master another matter, not strictly within the terms of our August 5, 1982 Order of Reference, but nonetheless substantially related to the alleged discovery abuses at issue:

(5) plaintiffs' objection to defendants' failure through their counsel to produce during discovery the gross and net compensation figures which ultimately formed the basis of defendants' Trial Exhibit 131.2, which failure precluded plaintiffs from moving to strike Trial Exhibit 131.2 because it was the only available source at trial of the data needed by both sides.

Each party submitted over 40 pages of briefs and literally hundreds of pages of exhibits to the Special Master with reference to the five disputes listed above. On October 1, 1982 the Special Master submitted her report and recommendations, which are attached to this Order as "Exhibit A." The Court has found this report extremely helpful in resolving these difficult disputes, and warmly thanks the Special Master for her efforts.

On February 1, 1983, the Court served the parties with the Special Master's report, and gave the parties the

opportunity to respond in writing to that report. Both parties having done so, and the Court having now considered those brief, as well as the briefs and exhibits submitted to the Special Master, and having studied carefully the Special Master's recommendations, the Court enters the following Findings of Fact and Conclusions of Law with respect to the five disputes listed above. In addition, the Court notes that the factual questions underlying these five disputes are virtually identical to the factual questions underlying the earlier sanctions question referred to the Magistrate, and hence in the interest of judicial economy the Court vacates the earlier referral of this question to the Magistrate and enters Findings of Fact and Conclusions of Law with respect to that sanctions question as well.

FINDINGS OF FACT

A. *Re: the AIB Cards and Declarations of Understanding.*

(1) Plaintiffs' request in December 1980 for production of "all applications for employment" did not constitute a clear and specific request that necessarily should have resulted in defendants' production to plaintiffs of the Aptitude Index Battery Cards and Declarations of Understanding maintained in the defendants' California regional offices.

(2) Plaintiffs' Interrogatories 14 and 15 propounded in June 1981 and requesting all underlying documents or writings relating to potential applications for employment did constitute a clear, specific and timely request

that should have resulted in defendants' timely production to plaintiffs of the AIB Cards and the Declarations of Understanding.

(3) This Court's Discovery Conference Order Of October 9, 1981 disposed of defendants' objections to Interrogatories 14 and 15, and required defendants to produce by October 29, 1981 "all applications for employment within the State of California since January 1, 1970, including all formal or informal applications, inquires, and/or solicitations regarding possible employment as a sales agent or a Sales Agent Trainee." This Court Order – even more clearly than plaintiffs' Interrogatories – should have resulted in defendants' timely production to plaintiffs of the AIB Cards and Declarations of Understanding.

(4) This Court's Discovery Conference Order of February 12, 1982 again compelled defendants to answer Interrogatories 14 and 15, this time by February 26, 1982. This Court Order also should have resulted in defendants' timely production to plaintiffs of the AIB Cards and Declarations of Understanding.

(5) Defendants through their counsel failed to make a good faith effort to search the various corporate files or to inquire of key employees to verify their counsel's erroneous assumptions regarding record-keeping, and thereby failed to produce to plaintiffs prior to trial the AIB Cards and Declarations of Understanding.

(6) Defendants' failure through their counsel to make a good faith search and to produce to plaintiffs prior to trial the AIB Cards and Declarations of Understanding constituted a violation of this Court's Discovery

Conference Orders of October 9, 1981 and February 12, 1982.

(7) Defendants did not produce to plaintiffs the AIB Cards or Declarations of Understanding until May 1982, after the fourth week of trial. This production was not a timely response to plaintiffs' June 1981 Interrogatories, nor was it timely compliance with this Court's Discovery Conference Orders of October 9, 1981 and February 12, 1982.

(8) Defendants' tardy production of the AIB Cards and Declarations of Understanding caused plaintiffs substantial actual prejudice, by seriously undercutting plaintiffs' ability and efforts to identify and locate other class members. Defendants' eventual mid-trial production did not cure the prejudice to plaintiff, because during the long delay – nearly eleven months from plaintiffs' June 1981 interrogatories until defendants' May 1982 production – many class members relocated, thereby impeding and in some cases perhaps altogether precluding plaintiffs from locating those class members.

(9) Defendants' tardy production of the AIB Cards and Declarations of Understanding did not prejudice plaintiffs' ability to prepare cross-examination of defense witnesses Hooker, Hunt and Smith, because those witnesses did not testify until June 1982.

B. *Re: Computer List by name of Women and Minority AIB test-takers.*

(10) Throughout this litigation, defendants maintained a special subset of the general computer file

E.GSS.APHDATA, which contained data *by name* on women and minority AIB test-takers who took the test prior to April 19, 1978.

(11) On January 23, 1981, defendants' counsel filed, on behalf of defendants, the Supplemental Affidavit of Dr. Wayne W. Sorenson, which stated, at p. 4, ¶ 11, "I have . . . reviewed the AIB files by name. . . . "

(12) Plaintiffs' Interrogatory 15 propounded in June 1981 and requesting all names and addresses of AIB test-takers should have resulted in defendants' production to plaintiffs of the special computerized list by name of women and minority AIB test-takers who took the test prior to April 19, 1978.

(13) This Court's Discovery Conference Order of October 9, 1981 disposed of defendants' objections to Interrogatory 15, and clearly required defendants to produce by October 29, 1981 the "names, addresses and phone numbers of State Farm . . . applicants for employment . . . contained in the E.GSS.APHDATA . . . computer files . . . in machine-readable form [wherever possible]." This Court Order should have resulted in defendants' timely production to plaintiffs of the computerized list by name of women and minority AIB test-takers who took the test prior to April 19, 1978.

(14) This Court's Discovery Conference Order of February 12, 1982 again compelled defendants to answer Interrogatory 15, this time by February 26, 1982. This Court Order also should have resulted in defendants' timely production to plaintiffs of the computerized list by name of women and minority AIB test-takers who took the test prior to April 19, 1978.

(15) Defendants through their counsel failed to make a good faith effort to search the various computer files for a computerized listing by name of women and minority AIB test-takers, and further failed to inquire of key employees, such as Dr. Sorenson, whether such computerized listing existed or just how it was that Dr. Sorenson had reviewed AIB files by name. Instead, defendants through their counsel blithely maintained until March 1982 that no computerized records of AIB test-takers by name existed.

(16) Defendants' failure through their counsel to make a good faith search and to produce to plaintiffs the computerized listing by name of women and minority AIB test-takers within the time-frames contemplated by the Court Orders constituted a violation of this Court's Discovery Conference Orders of October 9, 1981 and February 12, 1982.

(17) Defendants did not produce the computerized listing by name of women and minority AIB test-takers who took the test prior to April 19, 1978 until March 1982, after the discovery cut-off date. This tardy production was not a timely response to plaintiffs' June 1981 Interrogatory, nor was it timely compliance with this Court's Discovery Orders of October 9, 1981 and February 12, 1982.

(18) Defendants' tardy production of the computerized listing by name of women and minority AIB test-takers caused plaintiffs substantial actual prejudice, by seriously undercutting plaintiffs' ability and efforts to identify and locate other class members. Defendants'

eventual March 1982 production did not cure the prejudice to plaintiffs, because during the long delay – roughly nine months – many class members relocated, thereby impeding and in some cases perhaps altogether precluding plaintiffs from locating those class members.

C. *Re: The Testimony, Testimony Summary, and Expert Report of Elizabeth Milrod.*

(19) Local Rule 235-7(i) requires that pretrial statements include a "list of all witnesses likely to be called at trial, except for impeachment or rebuttal, together with a brief statement following each name describing the substance of the testimony to be given."

(20) Local Rule 235-7(j) requires that pretrial statements include a "list of all documents and other items to be offered as exhibits at trial, except for impeachment or rebuttal, with a brief statement following each describing its substance or purpose. . . . "

(21) Defendants through their counsel filed a pretrial statement on February 26, 1982 which failed to list Mrs. Elizabeth Milrod as a witness – thereby, of course, failing also to indicate what the substance of her testimony would be – and failed to list any report prepared by Mrs. Milrod as a trial exhibit.

(22) The deposition testimony provided by Mrs. Milrod at her March 1, 1982 deposition did not adequately provide plaintiffs with "the substance of the facts and opinions to which [this] expert [was] expected to testify and a summary of the grounds for each opinion," as required by Fed. R. Civ. P. 26(b)(4)(A)(1), because Mrs.

Milrod indicated that she had not then examined the facts of this case or formed any opinions on most matters at issue.

(23) This Court's Order Concerning Pretrial Motions of March 10, 1982 clearly required defendants to comply with Local Rule 235-7 and file no later than March 19, 1982 a "list of all documents and other items to be offered as exhibits at trial, except for impeachment or rebuttal, together with a brief statement following each describing its substance or purpose." This Order also cautioned that "[a]ny items or documents not filed as ordered shall be inadmissible at trial." This Order should have resulted in the listing of the report of Elizabeth Milrod no later than March 19, 1982, if defendants wanted to introduce such report at trial for purposes other than impeachment or rebuttal.

(24) On March 18, 1982, defendants through their counsel listed Mrs. Milrod as a witness likely to be called at trial, but the accompanying statement purporting to describe the substance of her testimony did not adequately provide plaintiffs with "the substance of the facts and opinions to which [this] expert [was] to testify and a summary of the grounds for each opinion," because the accompanying statement merely indicated in an extremely general way the type of data Mrs. Milrod would present without indicating what her opinions regarding this case were or even how the data to be presented would relate to the case.

(25) The deposition testimony provided by Mrs. Milrod at her April 23, 1982 deposition did adequately provide plaintiffs with "the substance of the facts and

opinions to which [this] expert [was] expected to testify and a summary of the grounds for each opinion," because she did review substantially all of the documentary evidence upon which she eventually would rely and also conveyed her essential opinions regarding most of the matters at issue in this case.

(26) The report prepared by Mrs. Milrod and first presented on June 25, 1982 was never listed by defendants as an exhibit for trial.

(27) The report prepared by Mrs. Milrod and first presented on June 25, 1982 did not constitute "impeachment or rebuttal."

(28) Plaintiffs did not suffer actual prejudice from the trial testimony of Elizabeth Milrod in June 1982, because the March 1982 notification that she would be testifying, combined with the April 1982 notification of the substance of her testimony through her deposition, provided plaintiffs sufficient time adequately to prepare for effective cross-examination of Mrs. Milrod's oral testimony. This finding in no way condones or excuses defendants' bad faith failure through their counsel to comply with the Court's Pre-trial Order and the Local Rules.

(29) Plaintiffs would suffer actual prejudice from the admission into evidence of the report of Elizabeth Milrod, because the June 25, 1982 presentation of that report was too late to provide plaintiffs adequate time to prepare for effective cross-examination and rebuttal of the substance of Mrs. Milrod's report.

D. *Re: Trial Exhibit 74 – the Handwritten Memo of Agency Manager Matt Madsen Regarding his Meeting with Muriel Kraszewski.*

(30) Plaintiffs' Interrogatories 13-17 propounded in June 1981 should have 6resulted in the production of the handwritten memo of Agency Manager Matt Madsen regarding his meeting with Muriel Kraszewski [hereinafter "the Madsen memo"].

(31) Defendants' responses of September 1981 to those interrogatories indicated that they knew of no such memo.

(32) Based on the Court's assessment of the credibility of plaintiffs' counsel Ruby S. Udell, and based on the absence of any proper affidavit from defendants or their counsel refuting Ms. Udell's testimony regarding the Madsen memo the Court finds that defendants did not produce the handwritten Madsen memo to plaintiffs at any time prior to the discovery cutoff date.

(33) This Court's Order Concerning Pretrial Motions of March 10, 1983 clearly required defendants to comply with Local Rule 235-7(j) regarding the listing of all trial exhibits no later than March 19, 1983. This Order should have resulted in the listing of the Madsen memo, if defendants wanted to introduce such memo at trial for purposes other than impeachment or rebuttal.

(34) Defendants through their counsel did not list the Madsen memo as a Trial Exhibit.

(35) Defendants first produced the Madsen memo at trial, as Trial Exhibit 74.

(36) Plaintiffs would suffer actual prejudice from the admission into evidence of the Madsen memo, because the production at trial was too late to provide plaintiffs sufficient time to prepare for effective cross-examination and rebuttal of the substance of that memo.

E. *Re: Trial Exhibit 131.2 – Records of Net and Gross Compensation for Trainee and Sales Agents.*

(37) Plaintiffs' Interrogatories 12 and 13 propounded in September 1981 should have resulted in defendants' production of gross and net compensation figures for State Farm Sales Agent Trainees and Sales Agents.

(38) Defendants through their counsel did not produce the gross and net compensation figures for Trainee and Sales Agents, but instead responded in September 1981 that the terms "gross and net compensation" were meaningless or – in the alternative – that the information requested was not discoverable because it related to settlement discussions.

(39) The terms "gross and net compensation" in this context evidently gained meaning for defendants and their counsel by January 1982, in light of defendants' counsel's preparation of Trial Exhibit 131.2 – a detailed summary of gross and net compensation for State Farm Sales Agent Trainees and Sales Agents during the periods at issue in this litigation.

(40) Defendants through their counsel failed to provide to plaintiffs at any time prior to the discovery cutoff

date the requested information regarding gross and net compensation figures for Trainee and Sales Agents.

(41) The gross and net compensation figures for Trainee and Sales Agents were properly and subject of discovery, and defendants' argument that the information "related to settlement discussions" was and is frivolous and wholly without merit. Indeed, defendants' argument is merely another instance of defendants' lack of good faith in complying with the legitimate discovery requests of plaintiffs and the discovery orders of this Court.

(42) On June 8, 1982, the Court ordered defendants to produce to plaintiffs the data regarding gross and net compensation of State Farm Trainee and Sales Agents.

(43) Even assuming that defendants did finally produce the data in response to the Court's June 8, 1982 Order, such mid-trial production was an untimely response to plaintiffs' request and effectively precluded plaintiffs from assembling the data into an exhibit of their own for trial.

(44) Plaintiffs' stipulation at trial to the admissibility of Trial Exhibit 131.2 was a direct result of defendants' failure to produce the underlying information to plaintiffs during discovery, and hence did not constitute a waiver of their right to seek sanctions against defendants on this point.

(45) Plaintiffs suffered substantial actual prejudice from defendants' failure to produce the information regarding gross and net compensation figures for Trainee and Sales Agents, because plaintiffs were forced to make do with Trial Exhibit 131.2 and were precluded from

preparing their own version of the same information, highlighting that part of the data which was favorable to their own case rather than to defendants' case.

F. *Re: The Pending Sanctions Issues from the three Orders to Compel, Previously Referred to the Magistrate.*

(46) Defendants' September 1981 objections to 59 of plaintiffs 73 Interrogatories propounded in June 1981 were dilatory, frivolous and wholly lacking in substantial justification. The defendants' basic position with respect to 40 of the 59 unanswered interrogatories – that defendants would not answer the questions until plaintiffs produced "credible evidence" to support the allegations underlying the questions – was recognizable as an absurdity to anyone even passingly familiar with the American discovery process. See Scovill Manufacturing Co. v. Sunbeam Corp., 61 F.R.D. 598 (D. Del. 1973).

(47) Defendants' dilatory and frivolous objections to plaintiffs' June 1981 Interrogatories forced plaintiffs to obtain the January 18, 1982 Order Compelling Discovery.

(48) Defendants' objections to plaintiffs' September 1981 Interrogatories were also dilatory, frivolous and wholly lacking in substantial justification. Again, defendants' position – that no specific responses were required because the information was equally available to plaintiffs in unspecified masses of deposition testimony and company records – was facially inconsistent with the American discovery process. See In Re Master Key, 15 F.R. Serv.2d 742 (D. Conn. 1971).

(49) Defendants' dilatory, frivolous and unjustified objections to plaintiffs' September 1981 Interrogatories forced plaintiffs to obtain the February 12, 1982 Order Compelling Responses.

(50) Defendants' position with respect to the disputes discussed in the May 11, 1982 Order Regarding Defendants' Noncompliance with Discovery Orders also wholly lacked substantial justification. The lengthy findings recited in the May 11, 1982 Order are hereby adopted and incorporated by reference as if fully set forth herein.

(51) The sanctions issues referred to the Magistrate on May 11, 1982 for disposition have in fact never been ruled on, and are not now on the Magistrate's calendar.

G. *GENERAL FINDINGS RE: Sections A-F Above.*

(52) With respect to each of the failures and discovery abuses of defendants detailed in sections A-F supra, the Court is satisfied that defendants' counsel had control over the circumstances surrounding those failures and abuses and hence bears by far the greatest share of responsibility for those failures and abuses.

(53) To the extent that any of the following Conclusions of Law are deemed to be Findings of Fact, they are incorporated herein.

CONCLUSIONS OF LAW

(54) To the extent that any of the foregoing Findings of Fact are deemed to be Conclusions of Law, they are incorporated herein.

A. *LEGAL STANDARDS RE: Sanctions.*

(55) With respect to defendants' and their attorneys' failure to obey Court Orders regarding discovery, this Court has authority to "make such orders in regard to the failure as are just." Fed. R. Civ. P. 37(b)(2). These orders may include, but are not limited to, orders establishing designated facts as established, orders striking designated testimony or exhibits, and orders "treating as contempt of court the failure to obey [the discovery orders]." Id.

(56) With respect to defendants' and their attorneys' failure to obey Court Orders regarding discovery, this Court has additional authority to "require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Court finds that the failure was substantially justified. . . . " Id.

(57) With respect to defendants' and their attorneys' evasion of legitimate discovery requests through false responses that the information or documents sought did not exist, this Court's "inherent power" to manage its own cases gives it authority to burden the deviant party with sanctions up to and including dismissal of the entire case. See Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962); Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Cal. L. Rev. 264, 268 (1979).

(58) With respect to defendants' and their attorneys' conduct which necessitated the plaintiffs' many motions to compel discovery, this Court is obligated to "require the party . . . whose conduct necessitated the motion or the . . . attorney advising such conduct or both of them to

pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the Court finds that the opposition to the motion was substantially justified. . . . " Fed. R. Civ. P. 37(a)(4).

(59) The normal sanctions rule followed by federal courts is that the proper sanction must be no more severe than is necessary to prevent prejudice to the victimized party. Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 504 (4th Cir. 1977), quoting Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1127 (5th Cir. 1970), cert. denied sub nom. Trefina v. United States, 400 U.S. 878 (1970).

(60) In cases where the party to be sanctioned has acted in "flagrant bad faith" and its counsel have "callous[ly] disregard[ed] their responsibilities," more extreme sanctions than mere prevention of prejudice to the victimized party are warranted. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam); G-K Properties v. Redevelopment Agency, Etc., 577 F.2d 645, 647 (9th Cir. 1978). The purpose of the more extreme sanctions in these cases of egregious discovery abuses is both to penalize the offending party and its counsel and to deter such conduct by other parties in other cases in other courts. National Hockey League, 427 U.S. at 643; G-K Properties, 577 F.2d at 648; Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Cal. L. Rev. 264, 275 (1979).

(61) Eventual but nonetheless tardy compliance with Court Orders and with legitimate discovery requests does not excuse discovery abuse, nor does it preclude imposition of sanctions. State of Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1374 (10th Cir. 1978). Otherwise,

parties would be free to flout their obligations until a trial court utterly loses patience with them, and thereby embroil trial judges in day-to-day supervision of discovery. Dellums v. Powell, 566 F.2d 231, 235, 36 (D.C. Cir. 1977).

(62) Where appropriate, sanctions for discovery abuse should be imposed on attorneys rather than on their clients. See Associated Radio Service Co. v. Page Airways, Inc., 73 F.R.D. 633, 636-37 (N.D. Tex. 1977); Fed. R. Civ. P. 37; Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Cal. L. Rev. 264, 273 (1977).

(63) In imposing particular sanctions, a trial court should be careful to explain why it has chosen one form of sanction rather than another. Wilson v. Volkswagen of America, Inc., 561 F.2d at 516.

B. *APPLICATION OF LEGAL STANDARDS TO THE INSTANT CASE.*

1. *Re: The AIB Cards and Declarations of Understanding.*

(64) In the context of the overall pattern of discovery abuse described in the Findings of Fact set forth above, defendants' disregard through their attorneys of two Court Orders and a very clear discovery request from plaintiffs constituted "flagrant bad faith" and "callous disregard for their responsibilities" both to plaintiffs and to this Court. See National Hockey League, 427 U.S. at 643.

(65) Since the Court wishes wherever possible to avoid fashioning a sanction which distorts the outcome of

the case by excluding relevant evidence or testimony, and since plaintiffs did not suffer actual prejudice in their ability to prepare cross-examination of defense witnesses Hunt, Hooker and Smith, the Court denies plaintiffs' motion to strike those three witnesses' testimony.

(66) Since plaintiffs have orally withdrawn their motion to reopen discovery based on the late production of the AIB Cards and Declarations of Understanding, and since reopening discovery would only serve to further delay in already needlessly protracted litigation, the Court rejects the possibility of sanctioning defendants by reopening discovery.

(67) Since plaintiffs' proposal that defendants pay the cost of a remedial notice to newly-discovered class members appears arbitrary, in that the cost of such notice is unrelated to the cost of remedying the actual harm suffered by the plaintiffs, the Court rejects this proposal.

(68) Rather, the appropriate sanction in this case to compensate plaintiffs for the harm caused by defendants' and their attorneys' misconduct is an Order "treating as contempt of court the failure to obey discovery orders." Fed. R. Civ. P. 37(b)(2). The specific sanctions imposed on defendants and their attorneys for their contemptuous conduct shall depend upon the outcome of this litigation on the merits. Should defendants prevail on the merits, the actual prejudice suffered by plaintiffs in lost opportunities to locate class members will be harmless, and the only appropriate compensatory sanction within this Court's civil contempt power will be an Order directing defendants and their attorneys to pay plaintiffs' reasonable attorneys' fees and costs in obtaining the two Court

orders of October 9, 1981 and February 12, 1982. Fed. R. Civ. P. 37(b)(2). However, should plaintiffs prevail on the merits, the actual prejudice suffered by plaintiffs in lost opportunities to locate class members will be quite substantial. In this event, the appropriate compensatory sanction within this Court's civil contempt power will be threefold: (1) an Order directing defendants and their attorneys to pay plaintiffs' reasonable attorneys' fees and costs in obtaining the two Court orders of October 9, 1981 and February 12, 1982 – which fees and costs would of course be recoverable independent of the dictates of Rule 37, since this is a civil rights case; (2) an Order directing that defendants and their attorneys shall pay plaintiffs' reasonable attorneys' fees and costs in attempting to locate any class members whose names appear on the AIB Cards, Declarations of Understanding or the Computerized Listing and whose address is not presently known to plaintiffs, such location attempts to be effected by any or all of the following means: (i) the use of professional name-tracing investigatory agencies; (ii) the use of the questionnaire to defendants' agents suggested at page 8 of the plaintiffs' brief to this Court; (iii) the use of any other method reasonably calculated to locate missing class members; (3) an Order directing that defendants and their attorneys shall hold open for class members not located within one year by the above-described means a fluid recovery fund, to which class members located at any time until January 1, 1990 can apply for recovery of damages based on membership in the class.

(69) Should plaintiffs prevail on the merits, the second and third Orders described in ¶(68) above shall be

implemented as follows: (a) defendants and their attorneys shall pay to plaintiffs' attorneys not later than 30 days from the date of the Court's judgment in this case the sum of $50,000, which sum plaintiffs' attorneys shall deposit in an interest-bearing account to be used for one year from the date of the Court's judgment to pay for the fees and costs incurred in attempting to locate the missing class members; at the conclusion of one year from the date of judgment, plaintiffs' attorneys shall submit to the Court a bill for the fees and costs actually incurred in the location efforts, and after approval by the Court, shall either refund to defendants and their attorneys the amount by which the account balance (including interest) exceeds the approved fees and costs, or shall be reimbursed by defendants and their attorneys for the amount by which the approved fees and costs exceed the amount available from the account (including interest); (b) defendants and their attorneys shall pay to plaintiffs' attorneys not later than 360 days from the date of the Court's judgment in this case the sum of $250,000.00, which sum plaintiffs' attorneys shall deposit in another interest-bearing account to be used until January 1, 1990 for the payment of any Court-approved recoveries to class members located after the ordinary period for the payment of judgment has lapsed. The sum described in subparagraph (a) above shall be shared equally between defendants and defendants' attorneys, but the sum described in subparagraph (b) shall be borne entirely by defendants.

(70) The purpose of the sanctions described in ¶¶(68)-(69) is remedial – i.e., to compensate plaintiffs for the interference with their rights to send individual notice to all class members, see, e.g., Oppenheimer Fund,

Inc. v. Sanders, 437 U.S. 340 (1978), which was caused by defendants' tardy production through their counsel of the AIB Cards and Declarations of Understanding.

(71) Although there is strong evidence in this case of "wilful disobedience" of court orders by defendants and their counsel which might have warranted a finding of criminal contempt, see Falstaff Brewing Corp. v. Miller Brewing Co., No. 81-4214, slip op. at 1311 (9th Cir. March 28, 1983) [hereinafter "Falstaff"]; Chapman v. Pacific Telephone & Telegraph Co., 613 F.2d 193, 195 (9th Cir. 1979), the Court's sole purpose in designing the sanctions described in ¶¶(68)-(69) is to compensate the plaintiffs for injuries suffered because of defendants' noncompliance through their attorneys with court orders, and hence the sanctions constitute civil rather than criminal contempt, Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911); Falstaff, No. 81-4214, slip op. at 1305; United States v. Asay, 614 F.2d 655, 659 (9th Cir. 1980).

(72) While civil contempt may have an incidental effect of vindicating the Court's authority, such incidental effect does not change the primary purpose or nature of the civil contempt order. Gompers, 221 U.S. at 443; Falstaff, No. 81-4214, slip op. at 1305.

(73) Because the civil contempt sanction described above does not involve dismissal or preclusion of evidence which might affect the merits of the case, the extensive briefing and hearing opportunities afforded defendants and their counsel on this matter have provided them with due process. See Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 n.14, 23 FEP Cases 12 (1980);

Societe Internationale v. Rogers, 357 U.S. 197, 208-212 (1958); Falstaff, No. 81-4214, slip op. at 1311 n.9.

(74) Sanctions against both defendants and their attorneys are appropriate under Fed. R. Civ. P. 37(b)(2). In this case, an order requiring defendants and their counsel to share equally the sanctions described in ¶(69)(a) above is fair because, while the Court is persuaded that defendants' counsel played a leading role in devising the strategy of noncompliance with court orders used in this case, the Court recognizes that defendants freely chose their counsel and very likely endorsed the strategy of noncompliance. See Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Cal. L. Rev. 264, 273 (1977). To the extent that defendants may be unwitting victims of their attorneys' misconduct, they can recover damages for any injury sustained because of that misconduct in a tort action for legal malpractice against those attorneys. Id. at 274. Similarly, an order requiring defendants alone to pay the sanctions described in ¶(69)(b) above is fair, because this sanction is intertwined with the ultimate remedy in the case.

(75) Finally, the Court notes with no little frustration that, given the facts of this case, most of the sanctions available to us do little to serve the deterrent effect contemplated by the Supreme Court in National Hockey League, 427 U.S. 639 (1976) (per curiam). Defendants and their counsel in this case evidently decided to take a "sporting chance" by ignoring legitimate discovery requests and violating Court Orders: if the abuse went uncaught and plaintiffs prevailed, defendants figured to reap substantial benefits in unpaid claims by their successful frustration of plaintiffs' attorneys' attempts to

locate class members; and even if the abuse was caught, defendants figured to get off fairly lightly if plaintiff prevailed on the merits, since this is a civil rights action in which plaintiffs would receive attorneys' fees anyway, and get off extremely lightly if defendants prevailed on the merits, since there would be little other than attorneys' fees for which plaintiffs could be compensated. Under these circumstances, the Court has labored long in attempting to devise sanctions which would deter defendants and their attorneys from taking such a "sporting chance" in the future, without exceeding the limits of our compensatory civil contempt power. Unfortunately, we must concede that the sanctions which will take effect should defendants prevail on the merits will have no real deterrent effect on defendants and their attorneys at all, and we can only note our regret that the sanctions available to us are as limited as they are. At the very least, we hope that the sanctions which will take effect should plaintiffs prevail will have a significant deterrent effect, both on defendants and their attorneys in this case, and on other potential discovery abusers in other cases in other courts. See National Hockey League, 427 U.S. at 643.

2. *Re: The Computer List by Name of Women and Minority AIB test-takers.*

(76) Since the prejudice to plaintiffs caused by the tardy production of the computerized list is basically the same as the prejudice caused by the tardy production of the AIB Cards and Declarations of Understanding, and since the sanctions described in ¶¶(68) and (74) above are

adequate to compensate plaintiffs for the prejudice suffered by both causes, there is no need to order separate sanctions for this discovery abuse. The Conclusions of Law set forth in ¶¶(64)-(75) are incorporated herein.

3. *Re: The Testimony, Testimony Summary, and Report of Elizabeth Milrod.*

(77) In the context of the overall pattern of discovery abuse described in the Findings of Fact set forth above, defendants' attorneys' failure to provide an adequate summary of Elizabeth Milrod's testimony pursuant to the Court's March 10, 1982 Order and failure to list the Milrod report as a Trial Exhibit constituted "flagrant bad faith" and "callous disregard for their responsibilities" both to plaintiffs and to the Court. See National Hockey League, 427 U.S. at 643.

(78) Because the plaintiffs did not suffer actual prejudice from the trial testimony of Elizabeth Milrod, suppression of that testimony would be an unwarranted sanction which would interfere with determination of the merits of the case. Accordingly, the Court rejects plaintiffs' suggestion that the testimony be stricken.

(79) Because plaintiffs would suffer actual prejudice from admission into evidence of the written report of Elizabeth Milrod, and because there appears to be no way to cure this prejudice other than to strike the report, the Court reinstates its earlier ruling that the report is inadmissible due to defendants' failure through their attorneys to list the report as a Trial Exhibit or even to produce the report to plaintiffs until the day it was offered into evidence. Fed. R. Civ. P. 16; see also United

States v. First Nat'l Bank of Circle, 652 F.2d 882 (9th Cir. 1981); Spellacy v. Southern Pac. Co., 428 F.2d 619 (9th Cir. 1970). The Court notes that the impact of this ruling on the merits of the case will be extremely minimal since the Milrod testimony is not being stricken.

(80) Because plaintiffs were required to take an extra deposition of Elizabeth Milrod in mid-trial merely to obtain a summary of her testimony that defendants' attorneys should have provided before trial pursuant to Local Rule 235-7 and Fed. R. Civ. P. 26(b)(4)(A)(1), see Knighton v. Villian & Fassio e Compagnia, 39 F.R.D. 11, 13 (D. Md. 1965), the defendants' attorneys shall be required to pay plaintiffs' reasonable costs and attorneys' fees in preparing for and taking the April 23, 1982 deposition of Elizabeth Milrod, if such costs and fees have not previously been awarded by this Court or by the Magistrate.

(81) The reason the costs and fees described in ¶(80) above shall be paid entirely by defendants' attorneys is that the failure to comply with the Local Rules regarding summaries of witness testimony appears to the Court to be a violation peculiarly within the province of defendants' attorneys, rather than misconduct attributable to the defendants themselves. Accordingly, defendants' attorneys are required to pay these costs and fees personally, and are prohibited from passing on these costs and fees to their clients. See Fed. R. Civ. P. 37(b)(2); Associated Radio Serv. Co. v. Page Airways, 73 F.R.D. at 636-37.

(82) The Court hereby incorporates by reference ¶¶(70)-(73) above to explain why the sanction described

in ¶(80) does not constitute a finding of criminal contempt.

4. *Re: Trial Exhibit 74 – the Handwritten Memo of Agency Manager Matt Madsen Regarding His Meeting with Muriel Kraszewski.*

(83) In the context of the overall pattern of discovery abuse described in the Findings of Fact set forth above, defendants' attorneys' failure to list the Madsen memo as a Trial Exhibit and their failure to produce the Madsen memo to plaintiffs prior to the discovery cutoff date constituted "flagrant bad faith" and "callous disregard for their responsibilities" to plaintiffs and to the Court. See National Hockey League, 427 U.S. at 643.

(84) Because plaintiffs would suffer actual prejudice from admission into evidence of the Madsen memo, and because there appears to be no way to cure this prejudice other than to strike the memo, the Court rules that the Madsen memo is inadmissible due to defendants' attorneys' failure to list the memo as a Trial Exhibit or even to produce the memo to plaintiffs until the day it was offered into evidence. Fed. R. Civ. P. 16; see also First Nat'l Bank of Circle, 652 F.2d 882; Spellacy, 428 F.2d 619. The Court notes that the impact of this ruling on the merits of the case will be extremely minimal, since the Madsen testimony is not being stricken.

(85) Pursuant to the Court's "inherent power" to manage its cases, see Link v. Wabash R.R., 370 U.S. at 630-31; Renfrew, *Discovery Sanctions: A Judicial Perspective* at 268, the Court orders defendants' attorneys to compensate plaintiffs in the sum of $1,500.00 for the harm caused

by the failure to produce the Madsen memo in accordance with plaintiffs' clear, timely and legitimate discovery request.

(86) The Court hereby incorporates by reference ¶(81) to explain why the sanction described in ¶(85) shall be paid by defendants' attorneys only, and incorporates by reference ¶¶(70)-(73) to explain why the sanction described in ¶(85) does not constitute a finding of criminal contempt.

5. *Re: Trial Exhibit 131.2 – Records of Net and Gross Compensation for Trainee and Sales Agents.*

(87) In the context of the overall pattern of discovery abuse described in the Findings of Fact set forth above, defendants' false statement through their attorneys that the gross and net compensation figures were meaningless or nondiscoverable – despite defendants' eventual use of those figures at trial – constituted "flagrant bad faith" and "callous disregard for their responsibilities" to plaintiffs and to the Court. See National Hockey League, 427 U.S. at 643.

(88) Pursuant to the Court's "inherent power" to manage its cases, see Link v. Wabash R.R., 370 U.S. at 630-31; Renfrew, *Discovery Sanctions: A Judicial Perspective* at 268, the Court orders defendants and their attorneys to compensate plaintiffs in the sum of $5,000.00 for the harm caused by the failure to produce the gross and net compensation figures in accordance with plaintiffs' clear, timely and legitimate discovery request. This sum shall be shared equally between defendants and their attorneys.

(89) The Court hereby incorporates by reference ¶(74) to explain why the sanction described in ¶(88) shall be paid by both defendants and their attorneys, and incorporates ¶¶(70)-(73) to explain why the sanction described in ¶(88) does not constitute a finding of criminal contempt.

6. *Re: The Pending Sanctions Issues from the Three Orders to Compel, Previously Referred to the Magistrate.*

(90) Pursuant to Fed. R. Civ. P. 37(b)(2), the Court orders defendants and their attorneys to pay plaintiffs their reasonable costs and attorneys fees in obtaining the Orders Compelling Discovery of January 18, 1982, February 12, 1982 and May 11, 1982. These costs and fees shall be shared equally by defendants and their attorneys.

(91) The Court hereby incorporates by reference ¶(74) to explain why the sanction described in ¶(90) shall be paid by both defendants and their attorneys, and incorporates ¶¶(70)-(73) to explain why the sanction described in ¶(90) does not constitute a finding of criminal contempt.

Accordingly, in good cause appearing,

IT IS HEREBY ORDERED THAT:

(1) Plaintiffs' motion to strike the testimony of defense witnesses Hunt, Hooker and Smith is denied.

(2) Plaintiffs' motion to strike the testimony of Elizabeth Milrod is denied.

(3) Plaintiffs' motion to strike the report of Elizabeth Milrod is granted.

(4) Plaintiffs' motion to strike the Madsen memorandum – Trial Exhibit 74 – is granted.

(5) Defendants and their attorneys shall pay to plaintiffs:

> (a) a sum of $5,000.00 to compensate plaintiffs for the harm caused by the failure to produce the gross and net compensation figures;
>
> (b) plaintiffs' reasonable costs and attorneys' fees in obtaining the Court Orders of October 9, 1981, January 18, 1982, February 12, 1982 and May 11, 1982, as well as plaintiffs' reasonable costs and attorneys' fees in presenting the sanctions matters to the Special Master and in briefing the sanctions matters to this Court in order to obtain this Order.

All sums, costs and fees described in sub paragraphs (a) and (b) immediately above shall be shared equally between defendants and their attorneys. With respect to attorneys' fees and costs described in subparagraph (b) above, plaintiffs shall file and serve upon defendants within thirty (30) days of the date of this Order the appropriate time-sheets, affidavits and any other necessary documentation, and the defendants shall file within fifteen (15) days of the date such documentation is served upon them any response or challenge to plaintiffs' figures. Such costs and attorneys' fees shall bear interest, accrual thereof to commence from the date of the Court's Order approving said costs and fees, in the amount of 8.72% per annum, compounded daily, in accordance with the Federal Courts Improvement Act of 1982, P.L. 97-164, 96 Stat. 55. See Copper Liquor, Inc. v. Adolph Coors Co.,

701 F.2d 542 (5th Cir. 1983); Perkins v. Standard Oil Co. of California, 487 F.2d 672 (9th Cir. 1973).

(6) Should this Court enter judgment against defendants in this case, defendants and their attorneys shall pay to plaintiffs' attorneys not later than thirty (30) days from the date of this Court's judgment in this case the sum of $50,000.00, which sum plaintiffs' attorneys shall deposit in an interest-bearing account to be used for one year from the date of the Court's judgment to pay for the fees and costs incurred in attempting to locate the missing class members; at the conclusion of one year from the date of judgment, plaintiffs' attorneys shall submit to the Court a bill for the fees and costs actually incurred in the location efforts, and after approval by the Court, shall either refund to defendants and their attorneys the amount by which the account balance (including interest) exceeds the approved fees and costs, or shall be reimbursed by defendants and their attorneys for the amount by which the approved fees and costs exceed the account available from the account (including interest). This sum shall be shared equally between defendants and their attorneys.

(7) Defendants' attorneys shall pay to plaintiffs:

(a) Plaintiffs' reasonable costs and attorneys' fees in preparing for and taking the April 23, 1982 deposition of Elizabeth Milrod, unless such costs and fees have previously been paid;

(b) the sum of $1,500.00 to compensate plaintiffs for the harm caused by the failure to produce the Madsen memo in accordance with plaintiffs' clear, timely and legitimate discovery request.

With respect to the costs and fees described in subparagraph (a) immediately above, the parties shall adhere to the same briefing schedule set forth in paragraph (5) above with respect to obtaining Court approval of the costs and fees; and again, once Court approval is obtained, such costs and fees shall bear interest, accrual thereof to commence on the date of the Court's Order approving costs and fees, in the amount of 8.72% per annum, compounded daily, in accordance with the Federal Courts Improvement Act of 1982, P.L. 97-164, 96 Stat. 55. See Copper Liquor, 701 F.2d 542; Perkins, 487 F.2d 672.

Defendants' attorneys are required to pay all costs, fees and sums described in subparagraphs (a) and (b) immediately above personally, and are prohibited from passing on these costs, fees and sums to their clients in any way.

(8) Should this Court enter judgment against defendants in this case, defendants shall pay to plaintiffs' attorneys not later than 360 days from the date of the Court's judgment in this case the sum of $250,000.00, which sum plaintiffs' attorneys shall deposit in another interest-bearing account to be used until January 1, 1990 for the payment of any Court-approved recoveries to class members located after the ordinary period for the payments of judgments has lapsed.

This sum shall be borne exclusively by defendants.

(9) Defendants shall pay to Professor May Kay Kane within seven (7) days of the date of this Order the sum of $2918.67 to compensate her for her services as Special Master in this matter, said sum representing her expenses

as approved by the Court for 34 and 2/3 hours at $85.00 per hour.

KRASZEWSKI v. STATE FARM INS. CO.

U.S. District Court,
Northern District of California

KRASZEWSKI, et al. v. STATE FARM GENERAL INSURANCE COMPANY, et al., No. C 79-1261 TEH, January 23, 1984

Full Text of Opinion

HENDERSON, District Judge: – The defendants and their counsel have moved for reconsideration of this Court's order of June 9, 1983 which assesses against them sanctions for discovery abuse. The matter has been exhaustively briefed and argued and, for the reasons stated below, the June 9th Order will be modified, in part, to reflect (1) the new evidence regarding production of the Madsen memo and (2) the appropriate statutory basis for the plaintiff's award of costs and attorneys' fees incurred in obtaining various motions to compel discovery. We find the moving parties' remaining objections to the June 9th Order to be without merit. Accordingly, their motion for reconsideration will be granted in part and denied in part. In the present order, we also grant the request of defendants and their counsel for a stay of this court's consideration of the plaintiffs' application for attorneys' fees and costs under paragraph (5)(b) of the June 9th Order at 31-32, pending further and limited discovery.

In moving for reconsideration of this Court's order of June 9, 1983, the defendants and their counsel challenge (1) the Court's characterization of the sanctions levied in that order as civil, (2) the sufficiency of the evidence

supporting the Court's findings of discovery abuse, and (3) the adequacy of their opportunities to be heard. Each challenge is discussed briefly and in turn below. Additionally, in response to the discovery dispute which has arisen regarding the plaintiffs' application for attorneys' fees under the June 9th Order, an expedited discovery and briefing schedule is set. The precise order of the Court in these related matters appears at the conclusion of this decision.

I. MOTION FOR RECONSIDERATION

A. *The Nature of the Sanctions*

The defendants and their counsel first challenge the Court's characterization of the sanctions levied in the June 9th Order as civil. They contend that the sanctions are punitive and were imposed without regard to the defendants' and their counsel's procedural rights under Rule 42(b) of the Federal Rules of Civil Procedure.[1] In support of this position, they argue that (1) the order's strong language is inconsistent with its compensatory purpose and effectively alters the nature of the sanctions from civil to criminal, and (2) the monetary sanctions imposed are not tailored to match the harm suffered by

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[1] Rule 42(b) governs the imposition of criminal contempt, levied pursuant to the court's inherent contempt power or its contempt power under Rule 37(b)(2)(D) of the Federal Rules of Civil Procedure. Rule 42(b) has been interpreted to require notice, a hearing, reasonable time to prepare a defense, proof of contempt beyond a reasonable doubt and the right to trial by jury in certain cases. See Falstaff Brewing Corp. v. Miller Brewing Corp., 702 F.2d 770, 777-78 n. 1 (9th Cir. 1983).

the plaintiffs and therefore cannot support their civil, compensatory label. Neither contention has merit.

First, sanctions are never "wholly civil nor altogether criminal." Gompers v. Bucks Stove and Range Co., 221 U.S. 418, 441 (1911). It is their primary purpose, however, rather than their incidental effects, which determines their civil or criminal nature. Falstaff Brewing Corp. v. Miller Brewing Corp., 702 F.2d 770, 778 (9th Cir. 1983) (hereafter cited as "Falstaff Brewing Corp."). The test is: what did the sanctioning court primarily seek to accomplish by imposing the sanctions? Falstaff Brewing Corp., 702 F.2d at-778. If the primary purpose of the sanction was to punish past defiance of a court's judicial authority, and thereby vindicate the court – the sanction is considered punitive and criminal. If, however, the court intended to compel obedience to a court order or to compensate the injured party for the harm suffered by his adversary's misconduct, the sanction is treated as civil. Id.

The defendants and their counsel suggest that this Court's clearly stated and executed goal of fashioning appropriate civil, compensatory sanctions is undercut by the Order's language which reveals this Court's displeasure with their conduct. No authority is cited for this proposition and we have found none to support it. To the contrary, given the district court's broad discretion to devise sanctions which effectively address discovery abuse, United States v. Westinghouse, 648 F.2d 642, 651 (9th Cir. 1981), it seems unlikely that a court, greatly disturbed by the conduct of a party or its counsel, is constrained from expressing that displeasure simply because it chooses to deal with the offensive behavior by

civil rather than criminal sanctions. We thus decline to alter the language of the June 9th Order on this ground.

Second, the defendants' and their counsel argue that the monetary sanctions do not adequately reflect the harm or prejudice suffered by the plaintiffs. By so arguing, they rightly note that the goal of compensatory sanctions is to make the injured party whole. Falstaff Brewing Corp, 702 F.2d at 779. In fashioning a compensatory sanction, the Court must tailor its award to the pecuniary injury caused by the unexcused conduct. Id. The amount necessary to compensate the aggrieved party may be estimated by the sanctioning court. United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1371 (9th Cir. 1980).

The June 9th Order provides for conditional and absolute monetary sanctions. The conditional sanctions, described at paragraphs 68 and 69 of the order, mature only if (1) the plaintiffs prevail on the merits, and (2) this Court approves any requested fees and recoveries as reasonable and appropriate. In other words, even if they prevail, the plaintiffs and their counsel will not be entitled to any compensatory awards until they make showings of need and injury, and those showings are tested by their adversaries and approved by this Court. We believe that this procedure will ensure that the awards approved, if any, will reflect the losses suffered by the plaintiffs and their counsel. Moreover, we reject the defendants' and their counsel's contention that the absolute award of $5000 provided by paragraph 88 of the June 9th Order, is an unreasonable estimation of the prejudice suffered by the plaintiffs because of their inability to present this Court with their version of critical financial information.

See June 9th Order at ¶¶37-45, 87-89. After fully reconsidering the propriety of the award, we believe that it adequately reflects and monetizes the strategic loss suffered by the plaintiffs and thus decline to alter the amount of the modest sum awarded.

B. *Sufficiency of the Evidence*

The defendants and their counsel next broadly challenge the sufficiency of the evidence supporting this Court's findings of discovery abuse. After careful review of the record, we find the defendants' and their counsel's position as to the Madsen memo well-taken and the June 9th Order will be modified to reflect it. Their remaining arguments, however, we reject.

First, we agree that the record no longer supports the monetary and preclusionary sanctions levied in regard to the Madsen memo. With their motion for reconsideration, the defendants and their counsel present new and undisputed evidence which reveals that the Madsen memo was properly listed as a trial exhibit. Moreover, on further reflection, we believe that the disputed factual circumstances surrounding the tardy production of the memo alone cannot support the sanctions levied. Accordingly, findings of fact 30 through 36, and findings of law 83 through 86 will be vacated. Additionally, the Madsen memo will be admitted into evidence and the plaintiffs will be ordered to return the $1500 monetary sanction to defense counsel.

Second, we find that the record fully supports the remaining sanctions. Accordingly, we reject the contentions of defendants and their counsel that the tardy production of the AIB Cards, Declarations of Understanding, the Milrod

Report and the net compensation date cannot support the sanctions levied.

C. *Due Process*

The defendants and their counsel lastly argue that they have been denied adequate opportunities to explain their conduct. They assert that this Court erred in failing to hold an evidentiary hearing before it imposed civil sanctions under its Rule 37(b)(2)(D) contempt power, Fed. R. Civ. P.[2] and pursuant to its inherent managerial powers, see Link v. Wabash, 370 U.S. 626, 630-31 (1962). They also claim that their hearing rights under Rule 37(a)(4) of the Federal Rules of Civil Procedure were violated by this Court's failure to hold separate hearings on the propriety of awarding the plaintiffs their reasonable expenses under that rule.[3] We find both positions unsupportable.

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[2] Rule 37(b)(2)(D) provides, in relevant part:

> If a party . . . fails to obey an order to provide or permit discovery, . . . the court . . . may make such orders in regard to the failure as are just, and among others the following:
>
> (D) . . . an order treating as a contempt of court the failure to obey any orders. . . .

[3] In our Order of June 9, 1983, we mistakenly awarded the plaintiffs their reasonable costs and attorneys' fees in obtaining the Court Orders of October 9, 1981, January 18, 1982, February 12, 1982, and May 11, 1982, under Rule 37(b)(2) of the Federal Rules of Civil Procedure. As the defendants and their counsel rightly point out, the proper basis of that award is Rule 37(a)(4) of the Federal Rules of Civil Procedure. See supra at note 4 for the text of Fed. R. Civ. P. 37(a)(4). The Order of June 9, 1983 will be modified to correct the Court's error.

First, the Ninth Circuit has consistently rejected the position put forth by defendants and their counsel that an *evidentiary* hearing must always precede the imposition of sanctions. See, e.g., Wyle v. R. J. Reynolds, 709 F.2d 585, 592 (9th Cir. 1983) ("*When necessary*, the district court *may* hold an evidentiary hearing on a motion for sanctions.") (Emphasis added). In this circuit and others, the dictates of due process are satisfied where the sanctioned party has a real and full opportunity to explain his questionable conduct before sanctions are imposed. See, e.g., Miranda v. Southern Pacific, 710 F.2d 516, 522 (9th Cir. 1983); United States v. Blodgett, 709 F.2d 608, 610 (9th Cir. 1983); United States v. Westinghouse, 648 F.2d 642, 652 (9th Cir. 1981); see also, Margoles v. Johns, 587 F.2d 885, 888-89 (5th Cir. 1978). Moreover, where, as here, the briefs, affidavits and other documentary evidence, fully recount the non-compliance with the court's orders and reveal no material factual disputes, courts have long discounted the need for evidentiary hearings. Hoffman Etc. v. Beer Drivers and Salesmen's, Etc., 536 F.2d 1268, 1277, 92 LRRM 3302 (9th Cir. 1976); Margoles v. Johns, 587 F.2d at 888-89. Indeed, neither in their briefs nor at oral argument on this motion, did the defendants or their counsel point to any circumstances which would support their request for an evidentiary hearing. We therefore reaffirm our finding at paragraph 73 of the Order that "the extensive briefing and hearing opportunities afforded defendants and their counsel in this matter have provided them with due process."

Second, we find no merit in the contention of defendants and their counsel that they have not had an adequate opportunity to explain why their oppositions to the

plaintiffs' motions to compel discovery were "substantially justified." Fed. R. Civ. P. 37(a)(4).[4] To the contrary, the record reflects that the defendants and their counsel have fully explained their oppositions to each of the plaintiffs' motions to compel discovery at issue here. Those explanations were offered by the defendants and their counsel during their oral and written oppositions to the substantive motions to compel discovery. Moreover, neither in their briefs nor at oral argument on this motion, did they raise any new or different information from that which has already been presented to and rejected by this Court. Accordingly, we hold that the hearing requirement of Rule 37(a)(4) has been fully satisfied. See Persson v. Faestel Investments, Inc., 88 F.R.D. 668, 670 (N.D. Ill. E.D. 1980) (Where the sanctioned party has fully explained his conduct in opposing the motion to compel discovery and has thereby presented the court with a sufficient record from which it can determine whether the conduct was "substantially justified," a separate hearing on the propriety of the award of expenses and fees is not required.). Of course, the defendants and

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[4] Rule 37(a)(4) provides in relevant part,

> If the motion [to compel] is granted, the court shall, after opportunity for hearing, require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

their counsel will have full opportunity to challenge the *reasonableness* of any award of expenses and fees made under Rule 37(a)(4). In this motion, we reject only the need for an additional hearing as to the *propriety* of those awards.

II. PLAINTIFFS' APPLICATION FOR COSTS AND ATTORNEYS' FEES.

Moving under the June 9th Order, the plaintiffs have submitted an application for attorneys' fees of $99,843.00 and costs of $421.00. See paragraph (5)(b) of the June 9th Order at 31-32. The defendants and their counsel challenge the adequacy of the documentation supporting the plaintiffs' application and ask this Court to (1) stay our consideration of the application pending further discovery, and (2) order the plaintiffs to produce copies of original time sheets in support of the application.

After carefully considering the conflicting interests presented by this dispute, we conclude that it is appropriate to briefly stay our consideration of the plaintiffs' application to allow the defendants to engage in limited and expedited discovery. In so ruling, we accept as reasonable the contention of defendants and their counsel that they are entitled to review copies of the pertinent original timesheets kept by plaintiffs in this action. See paragraph (5)(b) of the June 9th Order at 31:23-24; see also 1 Pt. 2 Moore's Federal Practice ¶1.47 at 49. However, we reject emphatically, as unnecessary, unreasonable and burdensome, the request of the defendants and their counsel to review copies of *all* timesheets kept by plaintiffs' counsel during the period of this protracted

litigation. We will therefore order the plaintiffs to produce copies of the original time sheets which support the typed compilations of hours which they have already submitted to this Court within twenty days of the date of this order. Additionally, defendants and their counsel will be ordered to notice and schedule the desired depositions of Messrs. Jerome Falk and Stanley Friedman, according to the applicable federal and local rules, within twenty days of the date of this order.[5]

After the close of this limited discovery, the defendants and their counsel will have fifteen days to file a response to the plaintiffs' application for attorneys' fees and costs. Ten days thereafter, the plaintiffs shall file their reply, if any, to the opposing papers. A hearing on the plaintiffs' application will then be scheduled by the Court forthwith.

III. ORDER

For the reasons stated above, IT IS HEREBY ORDERED that:

1. Findings of fact thirty (30) through thirty-six (36), conclusions of law eighty-three (83) through eighty-six (86), and paragraph (7)(b) at 33:1-4 in this Court's order of June 9, 1983 assessing sanctions for discovery abuse are vacated.

2. The Madsen memo is admitted into evidence.

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[5] In so ruling, we express no opinion in the need or propriety of the requested depositions.

3. Plaintiffs shall return the $1500.00 monetary sanction erroneously levied in connection with the Madsen memo to the defendants within ten days of the date of this order.

4. The June 9th Order is modified at paragraphs 68 (21:4), and 90 (30:14), to strike the erroneous references to Rule 37(b)(2) of the Federal Rules of Civil Procedure and to reflect the proper authority of Rule 37(a)(4) of the Federal Rules of Civil Procedure.

5. The remainder of the motion for reconsideration is denied.

6. Consideration of the plaintiffs' application for attorneys' fees is stayed, pending completion of the limited and expedited discovery ordered below:

a. Within twenty days of the date of this order, plaintiffs shall produce for defendants and their counsel copies of those original time sheets kept by plaintiffs' counsel in this case which support the typed compilations of hours already submitted.

b. Within twenty days of the date of this order, defendants and their counsel are ordered to notice and schedule, according to the applicable federal and local rules, the desired depositions of Messrs. Falk and Friedman.

7. Defendants are granted fifteen days, after the close of the limited discovery period described at paragraph six, supra, to respond to the plaintiffs' application for attorneys' fees and costs. Plaintiffs are granted ten

days from the filing of the opposing papers to submit a reply, if any. Copies of all briefs in this matter will be hand delivered to this chambers and to the opposing party.

IT IS SO ORDERED.

KRASZEWSKI v. STATE FARM INS. CO.

U.S. District Court,
Northern District of California

KRASZEWSKI, et al. v. STATE FARM GENERAL INSURANCE COMPANY, et al., No. C79-1261 TEH, June 11, 1984

Full Text of Opinion

HENDERSON, District Judge: – In our Order of June 9, 1983, assessing against defendants and their counsel sanctions for discovery abuse, and in our related Order of January 23, 1984, upholding in large part the earlier decision against the motion for reconsideration filed by defendants and their counsel, we ruled that the plaintiffs were entitled, under Rule 37(a)(4) of the Federal Rules of Civil Procedure, to be reimbursed for the expenses they incurred in obtaining the improperly denied discovery and in seeking sanctions for the discovery abuse before a special master and this Court. Now before the Court is the plaintiffs' application for an award of reasonable attorneys' fees and costs under those orders. With this application, the plaintiffs also ask to be compensated for the additional expenses they have sustained in upholding the Order of June 9, 1983 against the motion for reconsideration and in submitting the present fee application to the Court. In total, they seek an award of $139,748.25 in attorneys' fees and $908.50 in costs.

The defendants and their counsel oppose the plaintiffs' request for compensation challenging, in the main, (1) the plaintiffs' entitlement to fees and costs sustained

in opposing the motion for reconsideration and in presenting this fee application to the Court, (2) the adequacy of the factual showing made by the plaintiffs in support of the claimed time expenditures, (3) the propriety of using appropriate current hourly rates to calculate a reasonable fee, and (4) the plaintiffs' entitlement to a fully compensatory award in light of their failure to prevail on one claim.

This Court has carefully considered the written and oral arguments of counsel and the extensive evidentiary record presented. Based on that review, as well as our familiarity with the underlying disputes, the performance of the plaintiffs' counsel, and our application of the pertinent Kerr v. Screen Extras Guild, Inc. factors,[1] we conclude that plaintiffs are entitled to attorneys' fees in the amount of $131,031.25 and costs of $908.50. This award reflects our conclusions that: (1) the plaintiffs are entitled, under Rule 37(a)(4) of the Federal Rules of Civil Procedure, to be reimbursed for the fees and costs they reasonably incurred in opposing the motion for reconsideration and in presenting this fee application to the Court, (2) the factual showing made by the plaintiffs in support of the time expenditures of their counsel is

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[1] In Kerr, 526 F.2d 67, 70, 90 LRRM 3272 (9th Cir. 1975), cert. denied sub nom. Perkins v. Screen Extras Guild, 425 U.S. 951, 92 LRRM 2058 (1976), the Court of Appeals established that the determination of a reasonable fee is accomplished by consideration of the twelve factors enumerated in Johnson v. Georgia Express, Inc., 488 F.2d 714, 7 FEP Cases 1 (5th Cir. 1974). For further discussion of the calculation of the reasonable fee, see infra at pp. 11-20.

sufficient to establish 835.15 compensable hours; (3) use of appropriate current hourly rates equitably adjusts the fee award for the combined effects of delay and inflation, and (4) a reduction of $2000.00 in the lodestar calculation is appropriate to reflect the plaintiffs failure to prevail on the Madsen memo issue.

I. *BACKGROUND*

A. *Procedural History*

We established the plaintiffs' entitlement to an award of expenses in our Order of June 9, 1983 (hereafter referred to as the "June Sanctions Order"). In that Order, we found that the plaintiffs were entitled, under Rule 37(a)(4) of the Federal Rules of Civil Procedure,[2] to reasonable compensation for the efforts of their counsel "in obtaining the Court Orders of October 9, 1981, January 18, 1982, February 12, 1982 and May 11, 1982, . . . [and] in presenting the sanctions matters to the Special Master and in briefing the sanctions matters to this Court in

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[2] In pertinent part, Rule 37(a)(4) provides:

> If the motion [to compel] is granted, the court shall, after opportunity for hearing, require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

order to obtain this Order." June Sanctions Order, 31-32 at ¶(5)(b); Order of January 23, 1984, 7 n. 3 and 11 at ¶4 (hereafter referred to as the "January Sanctions Order").[3] We also ruled that compensation was available to the plaintiffs for the expenses reasonably incurred "in preparing for and taking the April 23, 1982 deposition of Elizabeth Milrod." June Sanctions Order, 32 at ¶(7)(a), 26-28 at ¶¶(77)-(82).[4]

Calculation of a reasonable award for the matters identified in the June Sanctions Order was delayed by this Court's consideration of the sweeping motion for reconsideration filed by the defendants and their counsel. The motion for reconsideration was exhaustively briefed and argued in this Court. In our Order of January 23, 1984, we upheld, in large part, the June Sanctions Order against the motion for reconsideration. See January Sanctions Order. We did, however, find that the record no longer supported our findings regarding defense counsel's purported failure to produce or properly list as a trial exhibit a one-page document known as the "Madsen memo." See January Sanctions Order, 5-6. As to that claim, the motion for reconsideration was granted and the June Sanctions Order amended accordingly. See id. at 11, ¶¶1-3.

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[3] The fees and costs assessed under this portion of the June Sanctions Order are to be borne equally by defendants and their counsel. See June Sanctions Order, 31 at ¶(5)(b)

[4] The fees and costs assessed by this portion of the June Sanctions Order are to be borne only by defendants' counsel. See June Sanctions Order, 32 at ¶ (7)(a).

In the January Sanctions Order, we also resolved several discovery disputes concerning the plaintiffs' application for fees and costs which had been filed shortly before the motion for reconsideration. See id. at 9-10, 11-12 at ¶¶6-7; see also Plaintiffs' Application for Reasonable Attorneys' Fees and Costs Pursuant to Order Assessing Sanctions for Discovery Abuse, June 30, 1983. We provided for a brief period of discovery to be followed by briefing and a hearing on the reasonableness of the compensation requested by the plaintiffs under the Sanctions Orders. See January Sanctions Order, 9-10, 11-12 at ¶¶6-7. A hearing on the plaintiffs' application for costs and fees was held in this Court on April 26, 1984. After supplemental briefing, the matter was submitted on May 10, 1984.

B. *The Plaintiffs' Application for Reasonable Attorneys' Fees and Costs.*

The plaintiffs have documented their request for an award of reasonable expenses in three stages. On June 30, 1983, they submitted an application for attorneys' fees of $99,843.00 and costs of $421.00 for the expenses incurred in pursuing the matters identified in the June Sanctions Order. On March 8, 1984, the plaintiffs filed additional documentation to support their bid for $37,894.50 in attorneys' fees to cover the expenses they incurred in opposing the motion for reconsideration and in presenting the fee application to this Court. And, on April 26, 1984, the plaintiffs amended slightly their total request for compensation, seeking an additional $2,010.75 in attorneys' fees and $487.50 in costs. This final portion of the fee request reflects additional expenses incurred by

plaintiffs since March 8, 1984 and corrects several errors in the earlier submissions.

The plaintiffs document their request for $139,748.25 in attorneys' fees, the major portion of their application for compensation, in the following ways. To establish the number of hours spent by their counsel – Guy T. Saperstein, Jeffrey S. Brand, Brad Seligman and Ruby S. Udell – on compensable matters, the plaintiffs submit time summaries for each attorney for whose services compensation is sought.[5] The summaries were compiled from contemporaneous, hand-written time records which each lawyer maintained daily throughout this litigation.[6] Each entry indicates the hours logged by the attorney that day and describes the activity or activities which consumed his or her time. To attest to the accuracy and trustworthiness of the time summaries, the plaintiffs submit declarations from Messrs. Saperstein, Brand, and Seligman which describe the manner in which the summaries were prepared and which indicate generally, and in narrative form, the nature of and need for the work performed.[7] Further, the sufficiency of the time keeping practices used generally by plaintiffs' counsel, and reflected in the time summaries, is supported by the statements of prominent local counsel who attest, in sworn declarations and deposition testimony, that the time records maintained by

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[5] See Exhibits 1, 12 to Plaintiffs' Application for Reasonable Attorneys' Fees and Costs Pursuant to Order Assessing Sanctions for Discovery Abuse (hereafter referred to as "Plaintiffs' Application for an Award of Expenses"); see also Plaintiffs' Proposed Reductions and Additions of Attorneys' Fees and Costs.

[6] See Exhibits 3, 4, 9, 11 and 13 to Plaintiffs' Application for an Award of Expenses.

[7] Id.

their respective firms in the normal course of business are virtually identical in form to those maintained by plaintiffs' counsel and submitted to the Court.[8] Also before the Court, as a result of the limited discovery provided by the January Sanctions Order, are copies of the contemporaneous, handwritten time records from which the time summaries were excerpted.[9]

On the basis of this factual showing, the plaintiffs seek compensation for the following time expended by their counsel:

ATTORNEY	HOURS
Guy T. Saperstein	271.30
Jeffrey S. Brand	506.75
Brad Seligman	34.20
Ruby S. Udell	64.50
	876.75

To establish an appropriate and reasonable hourly rate for the services of their counsel, the plaintiffs present declarations from their attorneys and prominent local counsel which describe the relevant rate structures and billing practices used generally in this community. Specifically, to support the reasonableness of the hourly rates requested, the plaintiffs submit sworn statements from Messrs. Saperstein and Brand which attest to: (1) the level of experience and education attained by each of the

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[8] See Exhibits 7, 10 to Plaintiffs' Application for an Award of Expenses.

[9] See Exhibits 7, 8, 9, 10, 11, 12, 13, 14 and 15 to Declaration of William G. James in Support of Defendants' Response to Plaintiffs' Application for Attorneys' Fees and Costs.

plaintiffs' attorneys,[10] (2) the current hourly rates at which clients are charged for their services in cases of similar complexity,[11] and (3) the hourly rates set by Courts of this District in calculating fee awards for plaintiffs' counsel in recent cases of similar complexity.[12] Prominent local attorneys also submit sworn statements in which they attest to the high regard in which the plaintiffs' counsel are held in the local legal community.[13] These declarations from local counsel also describe the rates charged and billing practices used by their respective law firms and indicate the hourly rates which counsel of similar experience, reputation and skill command in cases of similar complexity in the area.[14] The declarations indicate that lawyers with comparable qualifications and expertise bill their clients in cases of this sort at rates that are similar to and, in some instances, higher than the hourly rates plaintiffs propose.

On the basis of this factual showing, the plaintiffs seek compensation for the services of their counsel at the following hourly rates:

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[10] See Exhibits 3, 4 and 9 to Plaintiffs' Application for an Award of Expenses.

[11] Id.

[12] See Exhibit 3 to Plaintiffs' Application for an Award of Expenses.

[13] See Exhibits 5 and 8 to Plaintiffs' Application for an Award of Expenses.

[14] See Exhibits 5, 6, 7 and 8 to Plaintiffs' Application for an Award of Expenses.

ATTORNEY	HOURLY RATES[15]
Guy T. Saperstein	$165.00
Jeffrey S. Brand	165.00
Brad Seligman	125.00
Ruby S. Udell	110.00

In sum, the plaintiffs seek reimbursement for attorneys' fees of $139,748.25 and costs of $908.50. The requested award is calculated as follows:

I. Attorneys' fees

ATTORNEY	HOURS	HOURLY RATE	TOTAL
Guy T. Saperstein	271.30	$165.00	$ 44,764.50
Jeffrey S. Brand	506.75	165.00	83,613.75
Brad Seligman	34.20	125.00	4,275.00
Ruby S. Udell	64.50	110.00	7,095.00
			$139,748.25

[15] The hourly rates proposed by the plaintiffs reflect their counsel's current rates. According to a sworn statement submitted by Mr. Saperstein, the rates became effective January 1, 1984 and represent a routine annual increase designed to reflect increases in the hourly rates prevailing in the legal community, greater experience by counsel and inflation. See Exhibit 9 to Plaintiffs' Application for an Award of Expenses.

II. Costs

A. $421.00 – the cost of the deposition transcript for the April 23, 1982 deposition of Elizabeth Milrod.

B. $487.50 – costs related to the deposition of Jerome Falk, Jr. regarding the present fee application.

$908.50

This Court has reviewed the plaintiff's application for attorneys' fees and costs in light of the objections raised by the defendants and their counsel, and pursuant to our independent obligation to carefully scrutinize applications for courtawarded compensation. Recognizing that several aspects of our fees setting function requires estimations and approximations, we have exercised our discretion in this matter, informed by our extensive knowledge of this litigation and our experience with numerous other cases, to arrive at an award which we believe is fair, reasonable and appropriately compensatory. See Hensley v. Eckerhart, 461 U.S. 424, ___, 103 S.Ct. 1933, 1941-42, 31 FEP Cases 1169 (1983); White v. City of Richmond, 713 F.2d 458, 460 (9th Cir. 1983); Laffey v. Northwest Airlines, Inc., 572 F.Supp. 354, 361, 32 FEP Cases 770 (D.D.C. 1983). What follows is the analysis on which we base our award of attorneys' fees of $131,031.25 and costs of $908.50.

II. DISCUSSION

A. *The Plaintiffs' Entitlement to the Additional Fees and Costs Sought*

As an initial matter, we have no trouble concluding that the plaintiffs are entitled to recover the reasonable expenses they incurred both in defending the June Sanctions Order against the sweeping and largely unsuccessful motion for reconsideration filed by the defendants and their counsel, and in litigating the present fee application in this Court. To rule otherwise would contravene the just and well-established principle that failure to reimburse fee applicants for *all* efforts reasonably made to secure their rightful claim to compensation wrongly dilutes the ultimate award of expenses. See, e.g., Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1126 (9th Cir. 1981) ("attorneys fees may be awarded for time devoted in successfully defending appeals of or challenges to the district court's award of fees"); Manhart v. City of Los Angeles, Dept. of Water, Etc., 652 F.2d 904, 909, 26 FEP Cases 721 (9th Cir. 1981) ("time spent litigating the fee issue itself in the district court" is compensable); see also Tamari v. Bache & Co. (Lebanon) S.A.L., No. 83-1950, slip op. at 10-11 (7th Cir. Feb. 27, 1984); Aerway Laboratories, Inc. v. Arco Polymers, Inc., 90 F.R.D. 563, 565-66 (N.D. Ill. 1981). A contrary ruling would also undermine the compensatory purpose of Rule 37(a)(4). See Aerway Laboratories, Inc. v. Arco Polymers, Inc., 90 F.R.D. at 565-66 (Rule 37(a)(4) encompasses "*all* expenses, whenever incurred, that would not have been sustained had the opponent conducted itself properly.") (emphasis added); see also Tamari v. Bache & Co. (Lebanon) S.A.L., No. 83-1950, slip op. at 10-11.

We therefore reject, as unfounded, the challenge of defendants and their counsel to the propriety of compensating the plaintiffs for the efforts of their counsel in opposing the motion for reconsideration and in litigating the fee application. We next turn to the major task before us, that of calculating an award which fairly compensates the plaintiffs for the efforts of their counsel in the matters identified by the June Sanctions Order and the additional matters which we specify here.

B. *Calculation of the Reasonable Fee*

"The most useful point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1939; see also White v. City of Richmond, 713 F.2d at 460. This calculation produces the "lodestar" of the Court's base hourly fee analysis. See White v. City of Richmond, 713 F.2d at 460-61; Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 838-41 (9th Cir. 1982); Manhart v. City of Los Angeles, Dept. of Water and Power, 652 F.2d at 907; Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70, 90 LRRM 3272 (9th Cir. 1975), cert. denied sub nom. Perkins v. Screen Guild, Inc., 425 U.S. 951, 92 LRRM 2058 (1976); Powell v. U.S. Dept. of Justice, 569 F.Supp. 1192, 1202 (N.D. Cal. 1983). In this circuit, the two elements in the lodestar equation – the number of hours reasonably expended and the reasonable hourly rate – are fixed by considering the factors designated by the Court of Appeals in Kerr v. Screen Extras Guild, Inc., 526 F.2d at 70, which are applicable to the particular case. Sapper v.

Lenco Blade, Inc., 704 F.2d 1069, 1073 (9th Cir. 1983). The twelve Kerr factors are:

(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d at 70.

A preliminary – and critical factor – in arriving at the lodestar sum is the quality of the factual showing made by the fee applicant in support of the hours claimed and the hourly rates requested. See Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1939; White v. City of Richmond, 713 F.2d at 461; Shakey's, Inc. v. Covalt, 704 F.2d 426, 435-36, n. 14 (9th Cir. 1983); see also National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1324-29, 28 FEP Cases 1134 (D.C. Cir. 1982). To allow the Court and opposing counsel to adequately assess the merits of the fee request, the fee applicant must present a record of sufficient detail and trustworthiness "that the time expended and the need for the services are clearly established." White v. City of Richmond, 713 F.2d at 461. He also must present "specific evidence" of the prevailing community rate which counsel of similar experience, reputation, and skill command in cases of similar complexity in the community. National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d at

1325; see also White v. City of Richmond, 713 F.2d at 460. Where the fee application falls short of the required level of detail, the insufficiently documented hours and rates are disregarded. See White v. City of Richmond, 713 F.2d at 461; see also Hall v. City of Auburn, 567 F.Supp. 1222, 1228, 32 FEP Cases 486 (D. Me. 1983) (disallowing particular hours claimed because of vague work descriptions and time inconsistently recorded by several attorneys); Kane v. Martin Paint Stores, 439 F.Supp. 1054, 1056 (S.D. N.Y. 1977), aff'd, 578 F.2d 1368 (1978) (reducing the lodestar by 10% because of the applicant's failure to keep more precise time records); International Travel, etc. v. Western Airlines, 623 F.2d 1255, 1275 (8th Cir. 1980), cert. denied, 449 U.S. 1063 (1980) (uncertainties which arise because of imprecise recordkeeping should be resolved against the fee applicant.)

Once the lodestar is established, it may be adjusted upward or downward to reflect the characteristics of the particular case and counsel. Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1940-41; White v. City of Richmond, 713 F.2d at 461; see also Blum v. Stenson, 465 U.S. ___, 52 LW 4377, 4381-82, 34 FEP Cases 417 (U.S. March 21, 1984) (Brennan, J., concurring). In making these adjustments, the less objective of the Kerr factors again guide the Court. Of those factors, the Supreme Court has recently instructed that "the degree of success" or "the results obtained" is most critical. Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1940-41; see also White v. City of Richmond, 713 F.2d at 461.

With the present application for reasonable attorneys' fees, the plaintiffs seek only the lodestar sum. In opposing the plaintiffs' fee request, the defendants first,

and primarily, challenge the trustworthiness and evidentiary sufficiency of the time summaries submitted by the plaintiffs to document the hours spent by their counsel on compensable matters. The defendants contend that the poor record keeping practices of plaintiffs' counsel – evidenced by purportedly vague and composite work descriptions, internal inconsistencies among the time records of the four plaintiffs' attorneys, and rounded hourly time entries – justify denial of all fees or, in the alternative, call for a drastically reduced award.

1. *The Adequacy of the Plaintiffs' Factual Showing*

For the most part, the critique offered by the defendants and their counsel does not seriously undermine the plaintiffs' sound and adequate presentation. Contrary to their opponents' suggestion, the plaintiffs are not required to recite "the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainment of each attorney." Copeland v. Marshall, 641 F.2d 880, 891, 23 FEP Cases 967 (D.C. Cir. 1980) (en banc); accord Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1941 n.12; Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., 487 F.2d 161, 167 (3rd Cir. 1973); City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2nd Cir. 1974); see also Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1473, 26 WH Cases 152 (9th Cir. 1983); Shakey's Inc. v. Covalt, 704 F.2d at 435-36. Their documentary burden is satisfied by the production of "fairly definite information" as to the hours logged, Copeland v. Marshall, 641

F.2d at 891 (quoting Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., 487 F.2d at 167), the "general subject matter" of the work performed, Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1941 n.12, and in most cases, the approximate date of performance. In this circuit, that information can be provided by affidavits, time sheets or the like. See, e.g., White v. City of Richmond, 713 F.2d at 461; Shakey's Inc. v. Covalt, 704 F.2d at 435-36; Bonnette v. California Health and Welfare Agency, 704 F.2d at 1473.

The plaintiffs document the present fee application with detailed summaries based on contemporaneous time records. See supra at pp. 5-7. For the most part, the summaries indicate the general subject matter of the work performed by each of the four attorneys for whom fees are sought, the amount of the attorneys' time the tasks consumed and the dates of performance. To attest to the trustworthiness of the time summaries, the plaintiffs submit foundational evidence, sworn declarations from counsel indicating that the summaries were compiled by the two senior attorneys, Messrs. Saperstein and Brand, after review of each attorneys' handwritten contemporaneous time records. They further attest that *daily* time records were kept by counsel throughout this litigation.

The time summaries submitted by the plaintiffs easily satisfy the burden of documentation described. From the majority of the work descriptions provided, we can clearly discern the nature of the task for which compensation is sought, the general subject matter of the work, the amount of time expended and the date of performance. The plaintiffs' documentation is thus sufficient, in large part, to permit opposing counsel to adequately assess the

merits of the fee request and to allow this Court to independently determine whether the claimed expenditures are compensable under the subject orders and whether the amount of time spent on the compensable matters was reasonable and justified. See White v. City of Richmond, 713 F.2d at 461; National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d at 1327. Moreover, we are satisfied, from our review of the time summaries and the virtually identical corresponding entries in the original time records, that the plaintiffs' attorneys have recorded their time with sufficient accuracy and care to support an award of fees.

Despite our conclusion that the structure of the plaintiffs presentation is basically sound, we agree with the defendants and their counsel that certain ambiguities in the time summaries and the underlying time records must be resolved against the plaintiffs. Below we consider separately the time keeping practices of plaintiffs' counsel challenged by the defendants and their counsel as deficient.

a. *The Work Descriptions:* As already noted, the vast majority of the work descriptions provided meet or exceed the required level of specificity. A small percentage of the entries, however, indicate only the activity undertaken – e.g., an intra-firm conference – and fail to disclose the general subject matter of the activity. Without this additional, albeit general, information, this Court is unable to determine whether the time claimed falls within one of the compensable categories. Accordingly, the time described in this manner must be disallowed in

the calculation of the lodestar of this interim fee award.[16] Based on our independent review of the time sheets and underlying time records, we conclude that 17.8 hours claimed by Mr. Saperstein,[17] 11.5 hours claimed by Mr.

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[16] In a number of instances, the insufficiently described activity is one of several activities described in a single entry and designated by a single time expenditure. In those instances, this Court has exercised its discretion to estimate the amount of time to be disallowed. See Laffey v. Northwest Airlines, Inc., 572 F.Supp. 354, 361, 32 FEP Cases 770 (D.D.C. 1983) (Because many of the tasks involved in calculating a fee award are "inherently imprecise and require certain estimates or approximations," the court must often exercise its discretion in formulating an appropriate fee.). Our estimates are the product of several considerations, including the nature of the activity insufficiently described, the other activities listed in the entry and pertinent evidence bearing on the subject matter of the activity drawn from the more precise descriptions provided by other counsel.

[17] Below are noted the work descriptions in Mr. Saperstein's time summaries which this Court has found deficient and the corresponding deductions in time made:

9/10/81	Conference with Brand, .5 hrs. disallowed;
9/07/81	Conference with Brand, .5 hrs. disallowed;
9/24/81	Phone call to law clerk, .2 hrs. disallowed;
10/09/81	Conference with Brand, .5 hrs. disallowed;
10/09/81	Phone call from Goldstein, .5 hrs. disallowed;

(Continued on following page)

(Continued from previous page)

10/28/81	Conference with Brand, .5 hrs. disallowed;
1/29/82	Phone call to/from Brand and Udell, hrs. disallowed;
5/07/82	Conference with Brand, 2.0 hrs. disallowed;
5/10/82	Conference with Brand, 1.0 hrs. disallowed;
5/11/82	Conference with Brand, 3.0 hrs. disallowed;
7/29/82	Conference with Brand, .5 hrs. disallowed;
8/04/82	Phone calls to/from Shartis, 2.0 hrs. disallowed
9/06/82	Conference with Brand, .5 hrs. disallowed;
9/09/81	Conference with Brand, .5 hrs. disallowed;
9/23/82	Conference with Brand, .5 hrs. disallowed;
10/21/82	Conference with Brand, 1.0 hrs. disallowed;
10/22/82	Conference with Brand, 1.0 hrs. disallowed;
11/21/82	Conference with Brand, .5 hrs. disallowed;
6/28/83	Conference with Brand, .5 hrs. disallowed;

(Continued on following page)

Brand,[18] and hours claimed by Mr. Seligman[19] suffer from this deficiency and will not be figured into the lodestar

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(Continued from previous page)

8/04/83 Conference with Seligman, .5 hrs. disallowed;

10/24/83 Conference with Brand, .5 hrs. disallowed;

1/26/84 Conference with Brand, .5 hrs. disallowed.

[18] Below are noted the work descriptions in Mr. Brand's time summaries which this Court has found deficient and the corresponding deduction in time made:

10/21/81 Conference with Saperstein, .5 hrs. disallowed;

11/03/81 Conference with Saperstein, .5 hrs. disallowed;

1/06/82 Conference with Saperstein, .5 hrs. disallowed;

5/07/82 Conference with Saperstein, 2.0 hrs. disallowed;

5/10/82 Conference with Saperstein, 1.0 hrs. disallowed;

5/11/82 Conference with Saperstein, 3.0 hrs. disallowed;

7/29/82 Conference with Saperstein, 1.0 hrs. disallowed;

7/30/82 Phone call to/from Saperstein, .5 hrs. disallowed

(Continued on following page)

sum. Ms. Udell's entries are sufficiently detailed throughout to support the hours claimed.

b. *Composite Time Entries:* The time records of plaintiffs' counsel reflect the common and generally permissible time keeping practice of recording a day's activities with a single hourly figure, rather than assigning a precise time for each activity performed. Where compensation is arguably available for only some of the activities listed in a particular entry, plaintiffs' counsel have estimated the amount of time expended on the compensable matters. The defendants discredit the time thus claimed as insufficiently substantiated. We disagree.

(Continued from previous page)

9/06/82 Conference with Saperstein, .5 hrs. disallowed;
9/13/82 Conference with Saperstein, .5 hrs. disallowed;
9/14/82 Conference with Saperstein, .5 hrs. disallowed;
9/23/82 Conference with Saperstein, .5 hrs. disallowed;
10/21/82 Conference with Saperstein, .5 hrs. disallowed.

[19] Below are noted the work descriptions in Mr. Seligman's time summaries which this Court has found deficient and the corresponding deductions in time made:

8/12/82 Phone call – Guy Saperstein, .3 hrs. disallowed;
1/26/84 Conference with Saperstein and Nelson, .5 hrs. disallowed;

The mere fact that plaintiffs seek compensation for estimated time does not defeat their claim. See Bonnette v. California Health and Welfare Agency, 704 F.2d at 1473; see also Ramos v. Lamm, 713 F.2d 546, 553 n.2 (10th Cir. 1983). Fee applications, after all, need not recite "the exact number of minutes spent." Copeland v. Marshall, 641 F.2d at 891. Where, as here, the estimates are based on detailed contemporaneous time records maintained in the normal course of business by plaintiffs' counsel, and are supported by the sworn declarations of counsel, we see no reason to arbitrarily disallow the estimated time claimed. To the extent, however, that the estimates appear to reflect overstatements or unreasonable expenditures of time, the estimated time will, of course, be disallowed. See Ramos v. Lamm, 713 F.2d at 553 n.2 ("The district court should give special scrutiny to any . . . estimates of time expended and make reductions when appropriate.")

c. *Inconsistently Recorded Time:* In a very few instances, the plaintiffs' four attorneys have inconsistently recorded the time they spent in meetings or conversations with one another.[20] Two kinds of inconsistencies appear. The first involves entries for activities which are not reflected in the records of all the supposed participants. To reflect the minor ambiguities caused by these discrepancies, we find it appropriate to reduce each attorneys' total hourly request by one hour. See Futaldo v. Bishop, 635 F.2d 915, 922 (1st Cir. 1980); International

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[20] The majority of the entries challenged on this ground have already been discounted because of insufficiently detailed work descriptions. As a consequence, the problem noted here affects only a tiny percentage of the hours claimed.

Travel, etc. v. Western Airlines, 623 F.2d at 1275; Hall v. City of Auburn, 567 F.Supp. at 1228; Kane v. Martin Paint Stores, Inc., 439 F.Supp. at 1056.

The second kind of inconsistency presented involves discrepancies in the amount of time assigned by participating attorneys to the same event. To correct the uncertainties caused by these entries, we have compared the differing times allotted and disallowed the excess time noted in the larger entry. See, e.g., Futaldo v. Bishop, 635 F.2d at 922; Hall v. City of Auburn, 567 F.Supp. at 1228. Accordingly, two hours are reduced from hourly total submitted by Mr. Saperstein,[21] three hours are reduced from the hourly total submitted by Mr. Brand,[22] and one-half hour is reduced from the hourly total submitted by Mr. Seligman.[23]

In sum, and based on our review of the record, we find that the deduction of hours made in this regard constitutes an appropriate and fair corrective device to reflect the ambiguities caused by the minor discrepancies noted.[24]

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[21] This deduction accounts for the differing amounts of time ascribed by Messrs. Saperstein and Brand to their conference of February 3, 1983.

[22] This deduction accounts for the differing amounts of time ascribed by Messrs. Saperstein and Brand to their conference of September 3, 1982.

[23] This deduction accounts for the differing amounts of time ascribed by Messrs. Seligman and Brand to their conference of August 20, 1982.

[24] In authorizing these deductions, however, we are aware that the kind of inconsistencies criticized above may simply

(Continued on following page)

d. *Rounded Time Figures:* The defendants next attempt to cast doubt on the trustworthiness of the time keeping practices used by plaintiffs' counsel by noting the predominance of half hour and full hour entries in the time records of Messrs. Saperstein and Brand. We find no merit in their criticism. Although we may infer from the presence of the rounded time figures that counsel routinely made minor adjustments in recording their time, this inference alone is far from sufficient to undermine the evidence trustworthiness and general accuracy of the records before us. "Plaintiff[s'] counsel, of course, is not required to record in great detail how *each minute* of his time was expended." Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1941 n.12 (emphasis added). Accordingly, we decline to make any disallowances of time on this ground.

e. *Conclusion:* In sum, and pursuant to our obligation to independently review the fee applicants' documentation and exclude those hours insufficiently documented, the following deductions are made:

(Continued from previous page)

reflect the exercise by individual attorneys of a kind of "billing judgment" in the initial recording of time. For example, an attorney may decide not to record time spent in a conference in which he or she was not a major participant. If such a time keeping practice is routinely used, the attorney would be well-advised to inform the court via notations in the time sheets or affidavit. Absent some explanation, it is appropriate to resolve the uncertainties and ambiguities caused by these discrepancies against the fee applicant.

ATTORNEY	HOURS REDUCED
Guy T. Saperstein	20.80
Jeffrey S. Brand	17.50[25]
Brad Seligman	2.30
Ruby S. Udell	1.00
	41.60

2. *The Number of Hours Reasonably Expended*

The next step in calculating an appropriate fee is to determine the number of hours reasonably spent by plaintiffs' counsel on the three compensable matters: discovery, sanctions and attorneys' fees. See Fed. R. Civ. P. 37(a)(4) (an applicant for attorneys' fees under Rule 37(a)(4) is entitled only to an award for time reasonably expended). In assessing the reasonableness of the hours expended by plaintiffs' counsel, the Court has considered the total number of hours reported by each lawyer, the number of hours devoted by each lawyer to the three compensable areas, and the level of experience of the individual lawyers enlisted to perform the various tasks described.

For the most part, the defendants and their counsel do not contest the reasonableness of the hours plaintiffs' counsel invested in these matters.[26] Their silence on this

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[25] An additional two hours is reduced from Mr. Brand's hourly total to reflect scattered entries in his time summary which are not supported by the contemporaneous time records.

[26] The challenge offered by the defendants and their counsel to the number of intra-firm conferences held by the plaintiffs' lawyers has been mooted by this Court's disallowance of many of those hours on other grounds.

score is well-taken. See Copeland v. Marshall, 641 F.2d at 904 (a party who "litigate[s] tenaciously cannot then be heard to complain about the time necessarily spent" by the opposition); Richardson v. Restaurant Marketing Associates, Inc., 527 F.Supp. 690, 700, 31 FEP Cases 1562 (N.D. Cal. 1981). This Court's independent examination of the hours devoted to the compensable matters indicates that they were reasonably expended. Moreover, this examination bears out our impression, gleaned from observing plaintiffs' counsel at the various stages of this dispute, that the four plaintiffs' lawyers have litigated these matters and marshalled their efforts with remarkable efficiency.[27]

Accordingly, we find that the following hours devoted by plaintiffs' counsel to these matters are compensable:

ATTORNEY	HOURS
Guy T. Saperstein	250.50
Jeffrey S. Brand	489.25
Brad Seligman	31.90
Ruby S. Udell	63.50
	835.15

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[27] For the purposes of clarity, we specifically reject the challenge offered by the defendants and their counsel to the one-third of an hour spent by plaintiffs' counsel in conversation with a reporter from the local legal paper on June 15, 1983. Recovery under Rule 34(a)(7) of the Federal Rules of Civil Procedure encompasses "all expenses, whenever incurred, that would not have been sustained had the opponent conducted itself properly." Aerway Laboratories v. Arco Polymers, Inc., 90 F.R.D. at 565-66. Further, inasmuch as the work description indicates that Mr. Saperstein's time was spent *responding* to a question from a local reporter, we find no grounds to question the reasonableness of the expenditure.

3. *Reasonable Hourly Rates*

We are next charged with fixing a reasonable hourly rate for each of the plaintiffs' four attorneys. In establishing appropriate rates, we have considered a number of factors, including: (1) the hourly rates at which the plaintiffs' counsel customarily and currently bill their clients, (2) the hourly rates prevailing in the community for attorneys of similar experience, reputation, and skill, working on cases of similar complexity, (3) the hourly rates fixed by this Court, and other courts in this district, in calculating recent fee awards in similar cases, and (4) our analysis of the level of performance and skills of each of the plaintiffs' lawyers, based on our familiarity with their written and oral presentations in this Court.

The reasonableness of the rates requested by plaintiffs for the services of their counsel is fully supported by the record.[28] The requested rates are well within the range of those prevailing in this community for lawyers of comparable qualifications handling similar cases. See supra at pp. 7-8. Moreover the declarations attesting to the extensive experience and expertise of plaintiffs' counsel confirm what this Court has observed firsthand during the course of this dispute. Accordingly, we find it entirely appropriate to use the hourly rates requested by

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[28] The defendants do not challenge the adequacy of the factual showing made by the plaintiffs in support of the hourly rates requested – and rightly so. The plaintiffs have submitted specific evidence of the requested rates, see supra at pp. 6-7, evidence which has not been countered by the defendants or their counsel in any way.

the plaintiffs, and stated below, in calculating the lodestar sum:[29]

ATTORNEY	HOURLY RATE
Guy T. Saperstein	$165.00
Jeffrey S. Brand	165.00
Brad Seligman	125.00
Ruby S. Udell	110.00

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[29] These hourly rates reflect current billing rates, rather than those in effect at the time the various services were performed. Our decision to base this fee award on current, rather than historical, rates reflects our conclusion that use of the current hourly rates in this case "directly adjusts the award for the combined effects of delay in payment and inflation." Hanguard, Inc. v. Ethicon, Inc., 552 F.Supp. 820, 823 (N.D. Cal. 1982) (J. Weigel); see also Ramos v. Lamm, 713 F.2d at 555. Indeed, were we to calculate the fee using historical rates, adjusted upward to account for inflation and delay, see Richardson v. Restaurant Marketing Associates, Inc., 527 F.Supp. 690, 31 FEP Cases 1562 (N.D. Cal. 1981) (J. Patel), it appears that the final sum would be virtually identical to, or larger than, the fee calculated according to current rates. As such, in this case, we fully agree with those courts which have found that use of current rates simplifies the fee calculation and roughly counterbalances inflation and delay, without any attendant unfairness. See, e.g., Hanguard, Inc. v. Ethicon, Inc., 552 F.Supp. at 823; Ramos v. Lamm, 713 F.Supp. at 555; In re Ampicillin Antitrust Litigation, 81 F.R.D. 395, 402 (D.D.C. 1978).

Moreover, we find no merit in the protest of the defendants and their counsel that use of current hourly rates in calculating a fee award under Rule 37(a)(4) somehow transforms the nature of the award from compensatory to punitive. The lodestar sum – calculated according to adjusted historical or current hourly rates – is purely compensatory. It is only when the lodestar is adjusted by use of a multiplier that the award reflects factors other than the reasonable expenses incurred by the fee applicant.

4. *The Lodestar Sum*

Pursuant to the calculations entered above, the lodestar sum in this matter is $133,031.25. This figure is calculated as follows:

ATTORNEY	HOURS	HOURLY RATE	TOTAL
Guy T. Saperstein	250.50 @	$165.00	$ 41,332.50
Jeffrey S. Brand	489.25 @	165.00	80,726.25
Brad Seligman	31.90 @	125.00	3,987.50
Ruby S. Udell	63.50 @	110.00	6,985.00
			$133,031.25

5. *The Extent of the Plaintiffs' Success*

The Supreme Court has declared that if a fee applicant fails to prevail on claims "unrelated" to those on which he or she succeeds, the time expended on the unrelated and unsuccessful claims cannot be compensated. Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1940-43. The non-prevailing matter with which we are concerned involves the one-page document referred to as the "Madsen memo." See supra at p. 4.

We agree with the defendants and their counsel that this minor matter is "distinct in all respects" from the other claims of discovery abuse successfully pursued by the plaintiffs, Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1943. Accordingly, a deduction in the lodestar sum is appropriate to reflect the hours spent on the unsuccessful claim. Determination of the appropriate reduction is committed to the sound discretion of the district court, Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1941, and may involve "inherenty imprecise"

calculations. Laffey v. Northwest Airlines, Inc., 572 F.Supp. at 361.

Based on this Court's review of its notes, those portions of the record involving the Madsen memo, and the Court's recollection of the very small role played by this matter in the disputes litigated here, we conclude that a flat reduction of $2000.00 in the lodestar sum equitably reflects the plaintiffs' failure to prevail on this matter. Accordingly, the lodestar sum of $133,031.25 will be reduced by $2000.00 to account for the plaintiffs' lack of success on the Madsen memo issue.

5. *The Reasonable Award*

Based on the preceding analysis, we conclude that the plaintiffs are entitled to attorneys' fees in the amount of $131,031.25.

Further, we conclude that the costs requested by the plaintiffs are adequately documented, reasonable and compensable. Accordingly, plaintiffs are entitled to costs in the amount of $908.50.

III. ORDER

For the reasons stated above, IT IS HEREBY ORDERED that:

1. Within fifteen (15) days of the date of this Order, attorneys' fees of $131,031.25 and costs of $487.50 shall be paid to the plaintiffs. Thus sum of $131,518.75 shall be shared equally by the defendants and their counsel.

2. Within fifteen (15) days of the date of this Order, the defendants' counsel shall pay to the plaintiffs the $421.00 in costs associated with the deposition of Elizabeth Milrod. See June Sanctions Order, 32-33:15-18.

Supreme Court, U.S.
FILED
MAR 7 1991
OFFICE OF THE CLERK

No. 90-1179

In The

Supreme Court of the United States

October Term, 1990

STATE FARM GENERAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, AND STATE FARM FIRE AND CASUALTY COMPANY,

Petitioners,

v.

MURIEL E. KRASZEWSKI, DAISY O. JACKSON, AND WILDA TIPTON, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' APPENDIX VOLUME II

* GUY T. SAPERSTEIN
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KRASZEWSKI v. STATE FARM INS. CO.

U.S. District Court,
Northern District of California

KRASZEWSKI, et al. v. STATE FARM GENERAL INSURANCE COMPANY, et al., No. C 79-1261 TEH, April 29, 1985

Full Text of Opinion

HENDERSON, District Judge: –

FINDINGS OF FACT

Parties and Jurisdiction

1. Plaintiff Muriel Kraszewski is a woman and a resident of the County of Los Angeles, State of California.

2. On May 1, 1975, plaintiff Kraszewski filed a charge of discrimination with the Equal Employment Opportunity Commission alleging that defendants discriminated against her and others similarly situated by failing to recruit, select and hire women for the entry level sales position of State Farm trainee agent. Plaintiffs' Exhibit 84-1.

3. On April 29, 1979, the Equal Employment Opportunity Commission issued a Notice of Right to sue to plaintiff Kraszewski. Plaintiffs' Exhibit 84-2.

4. On June 1, 1979, plaintiff Kraszewski filed her Complaint herein alleging, on behalf of herself and others similarly situated, that defendants violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. by failing to select and hire women for the position of State Farm trainee agent.

5. Plaintiff Daisy O. Jackson is a woman and a resident of the County of Santa Clara, State of California.

6. On July 15, 1976, plaintiff Jackson filed a charge of discrimination with the Equal Employment Opportunity Commission alleging defendants threatened to terminate her as a State Farm trainee agent because of her sex. Plaintiffs' Exhibit 85-1.

7. On September 3, 1976, plaintiff Jackson filed an amended charge of discrimination with the Equal Employment Opportunity Commission alleging that defendants discriminated against her and others similarly situated by failing to recruit, select and hire her for the position of State Farm trainee agent. In addition, plaintiff Jackson alleged that she was terminated by defendants from her position of State Farm trainee agent because she is a woman. Plaintiffs' Exhibit 85-2.

8. On March 2, 1979, the Equal Employment Opportunity Commission issued a Notice of Right to Sue to plaintiff Jackson. Plaintiffs' Exhibit 85-4.

9. On June 1, 1979, plaintiff Jackson filed her Complaint herein alleging, on behalf of herself and others similarly situated, that defendants violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. by failing to recruit, select and hire women for the position of State Farm trainee agent. Plaintiff Jackson also alleged that defendants terminated her as a State Farm trainee agent because she is a woman.

10. Plaintiff Wilda Tipton is a woman and resident of the County of Ventura, State of California.

11. On June 15, 1979, plaintiff Tipton filed a charge of discrimination with the Equal Employment Opportunity Commission alleging that defendants discriminated against her and others similarly situated by failing to recruit, select and hire women for the position of State Farm trainee agent. Plaintiffs' Exhibit 86-1 and 86-2.

12. On February 27, 1980, the Equal Employment Opportunity Commission Issued a Notice of Right to Sue to plaintiff Tipton. Plaintiffs' Exhibit 86-3.

13. On May 1, 1980, plaintiff Tipton filed her Complaint in Intervention herein on behalf of herself and others similarly situated, alleging that defendants violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. by failing to recruit, select and hire women for the position of State Farm trainee agent.

14. On September 9, 1981, the court provisionally certified plaintiffs Kraszewski, Jackson and Tipton as representatives of a class which included:

All female applicants and deterred applicants who, at any time since July 5, 1974, have been or continue to be or may in the future be denied appointment, employment and/or training as Sales Agent Trainees by defendant companies within the State of California.

15. The named defendants, State Farm General Insurance Company, State Farm Mutual Automobile Insurance Company, State Farm Life Insurance Company and State Farm Fire and Casualty Company comprise the four State Farm Insurance Companies and are Illinois corporations doing business in the State of California.

16. Each defendant has been and continues to be engaged in an industry affecting commerce and has had

l continues to have 15 or more employees for each working day in each of 20 or more calendar weeks for all years herein relevant and are employers within the meaning of Title VII as previously found by the Court in its Order Denying Defendants' Motion to Dismiss dated May 13, 1982.

Organizational Structure of Defendants' Agency Sales Force and Operations Division

17. The State Farm Insurance Companies sell multiple lines of insurance to the public throughout the United States and within the State of California.

18. The State Farm Insurance Companies are divided into two divisions – operations and agency. The agency division is responsible for the sale of insurance policies and the operations division is responsible for issuing and servicing policies.

19. The State Farm Insurance Companies have their headquarters in Bloomington, Illinois, and have three regional offices within the State of California located at Rohnert Park (serving Northern California and known as the Northern California Regional Office); Westlake (serving Central California); and Costa Mesa (serving Southern California and known as the Southern California Regional Office).

20. Each region is headed by a regional vice president who is responsible for all activities of the State Farm Insurance Companies in that region. Each regional vice president is responsible for both the operations division and the agency sales force within his region. Two deputy

regional vice presidents assist each regional vice president. One supervises the region's agency sales force, and the other supervises the region's operations division.

21. The direct sale of defendants' multiple lines of insurance to the public is carried out by defendants' agency force. The agency force includes State Farm trainee agents, State Farm career sales agents, solicitors, office managers and agency secretaries.

Trainee Agents

22. The position of State Farm trainee agent is the entry level sales position at State Farm. This conclusion is corroborated by the following:

a. State Farm views the trainee agent position as a beginning position in which the individual "get[s] started" on his career as a State Farm sales agent. Thus, State Farm agency managers promise to "personally help you get started, every step of the way." Career Presentation, Plaintiffs' Exhibit 8-10 at page 8. The Career Presentation asks "How do you get started?" and answers as follows:

It's easy. You can begin right now with what we call pre-contract orientation.

This gives you the opportunity to get a first hand, behind-the-scenes view of the agent's career. You actually try it yourself without disturbing your present position.

We simply work and learn together.

We help you every step of the way.

at pages 19-20.

b. After a minimum of two years, an individual may attain the position of career agent and thereafter may

advance to management positions of agency manager or agency director. State Farm's Career Presentation, widely used by agency managers to explain the agency career to prospective trainee agents, explains that the opportunity presented by a career in agency includes "opportunity for advancement." The recruiting brochure points out that "[m]ost of the top people in State Farm *started out* as agents." Plaintiffs' Exhibit 8-10, p.5 (emphasis added).

c. As testified to by Regional Vice President Roger Tompkins, State Farm prefers that individuals not have any insurance experience so that State Farm can mold an individual to meet State Farm's needs and expectations. State Farm's actual hiring practices reflect their emphasis on candidates without insurance sales backgrounds. Plaintiffs' Exhibit 2-10 reflects that only 19.6% of the trainee agents appointed between 1970 and 1981 had prior insurance sales experience. This statistic is consistent with State Farm's admissions that no occupational or educational requirements for the trainee agent position exist, and that State Farm seeks trainee agents from "every walk of life." See paragraph 42.

d. Not only does State Farm seek individuals with no insurance experience, but State Farm actively looks for individuals who have not yet chosen a career. The Agency Manager Pre-Contract Guide and Text (Plaintiffs' Exhibit 31) states that a "major group in which people may . . . readily be interested in insurance selling as a career embraces people who have not yet definitely decided upon a career." Chapter 3 at page 4. State Farm's objective is to find people they can "interest" in a sales career and then train these individuals to be State Farm agents. Accordingly, the Agency Manager Pre-Contract

Guide and Text suggests that new agents can be found in "most any acceptable and reputable occupation." Plaintiffs' Exhibit 31, Chapter 3 at page 1.

e. Once a candidate is selected, the company teaches him what he needs to know. Thus, to make up for a lack of insurance sales experience, State Farm promises to completely train individuals in the sales and service skills, technical knowledge, business management and financial services needed to become an insurance sales agent. The agency manager promises "with my help in using State Farm's proven training procedures, you will learn how to uncover and develop qualified prospects, how to sell them and how to take care of all their insurance needs. You will learn how to plan your activities, analyze the results and use your time to best advantage." Career Presentation, Plaintiffs' Exhibit 8-10 at p. 21.

f. After the training period, an individual may become a career agent. Thereafter, State Farm continues to train the individual to promote opportunities for advancement. As the career presentation states: "We will help you become, and stay, a professional." Plaintiffs' Exhibit 8-10 at p. 22.

g. The fact that State Farm seeks individuals without prior insurance sales experience and promises candidates training and advancement places the trainee agent position within the labor economist's definition of an entry level job. During the course of his testimony, plaintiffs' expert labor economist, Dr. John Pencavel (see paragraphs 75 through 88) was asked:

Q. What is an entry level job?

A. I use that term to describe jobs, positions that are filled primarily by people from outside the company and jobs for which prior experience in that industry is not a necessary requirement. It is typically, a job that constitutes a rung in a ladder and the individual progresses up that ladder from this entry level position.

Q. Now is that definition of entry level job a commonly accepted definition in the field of economics?

A. Yes, it is.

RT: Wednesday, March 31, 1982, 89:5-17

h. Agency manager Warren Buckingham testified that the trainee agent position is the "entry level" sales position at State Farm.

23. State Farm's trainee agents are employed by State Farm under a written contract known as the State Farm Agency Building Plan Agreement. Under the terms of the contract, State Farm trainee agents represent the State Farm Insurance Companies in the sale of insurance and are compensated by State Farm for such sales while receiving the necessary training to receive an appointment as a State Farm career agent. Plaintiffs' Exhibit 45.

The Training of the State Farm Trainee Agent and Advancement to the Position of State Farm Career Sales Agent

24. A State Farm trainee agent may advance to the position of State Farm career agent after a minimum of two years of training. During this period, the trainee agent is subsidized by State Farm. See paragraphs 43 to 52.

25. During the training period, the State Farm trainee agent completes approximately 30 hours of supervised self-study. The trainee agent familiarizes himself or herself with State Farm products, legal requirements concerning insurance sales, and sales techniques as deemed necessary by State Farm.

26. Agency managers Denny Duray, Joe Fernandez and Paul Bush, who testified about defendants' training courses 1, 2 and 3 respectively, each stated that women do as well as men in each of State Farm's training courses. See also paragraph 88.

The State Farm Career Agent

27. Upon successful completion of the training period, State Farm appoints the trainee agent to the position of State Farm career agent. At that time, the individual enters into State Farm's Agent's Agreement. Plaintiffs' Exhibit 58.

28. Under the terms of the agreement, career agents are trained and evaluated by State Farm; sell exclusively State Farm products; have their commissions established and administered solely by State Farm; and may be terminated by defendants, but are not considered employees of State Farm. Plaintiffs' Exhibit 58.

29. A State Farm career agent sets his or her own production goals, sets his or her own hours, chooses his or her own staff, and is responsible for paying his or her own expenses including office rent, supplies and secretarial staff. Plaintiffs' Exhibit 58.

State Farm Agent Secretaries, Office Managers and Solicitors

30. State Farm solicitors are employed by State Farm career and trainee agents. Solicitors must be licensed by the State of California.

31. Most State Farm career agents and trainee agents also employ secretaries and/or office managers whose tasks include office administration and frequently the sale of defendants' multiple lines of insurance. See paragraphs 109-12.

Agency Managers, Agency Directors, Deputy Regional Vice Presidents and Regional Vice Presidents

32. State Farm agency managers have primary responsibility for the recruitment, selection and hire of State Farm career and trainee agents. Each agency manager directly supervises approximately 10-14 trainee and career agents within a given geographical area.

33. Each agency manager is responsible to an agency director. The agency director oversees the recruitment, selection, hire and overall performance of the agents and agency managers within his geographical area. All agency directors are employees of defendants.

34. Each agency director reports to the deputy regional vice president for agency. The deputy regional vice president identifies and plans recruitment goals; receives files of potential trainee agent appointments; and, in conjunction with agency managers, agency directors and the regional vice president, helps assign career agents to agency managers. All deputy regional vice presidents are employees of defendants.

35. Each deputy regional vice president for agency is responsible to the regional vice president. All regional vice presidents are employees of defendants.

Defendants' Operations Division

36. The administrative and support functions of the State Farm Insurance Companies, including claims adjusting, underwriting, policy issuance and policy service are carried out by State Farm's operations division in each of the three regions throughout the State of California.

37. In addition, each regional office has satellite offices primarily for claims adjustment throughout the state.

38. The Department of Agency Administration at each regional office maintains records for the region's agency force. The records maintained include:

a. Personnel files for State Farm trainee and career agents;

b. Certain Declarations of Understanding (hereinafter Declarations) signed by individuals interested in pursuing careers in agency; and,

c. Certain Aptitude Index Battery (hereinafter AIB) Cards indicating that certain individuals took the aptitude examination required to become trainee agents.

General Characteristics of the Position of State Farm Agent

39. A career as a State Farm agent is an attractive career that includes the prospect of high income, independence, and the backing of a company that provides

excellent insurance products and service. The fact that a career in agency is an excellent opportunity is corroborated by State Farm management personnel, current State Farm trainee and career agents, and documents promulgated by State Farm describing the agency career. For example:

a. Regional Vice President Donald Raker testified that a career in agency is a "golden opportunity," highlighting substantial income, independence, and a feeling of service to the community as some of its benefits.

b. Similarly, Linda Leaming, a defense witness and career agent, testified that a career in agency provides a chance for high income, independence, the ability to be your own boss, and the backing of a superior insurance company.

c. Career agent Judy Semler testified that State Farm was the best company in which to pursue a career as an insurance sales agent, in part, because of the flexible hours, control over one's life, good income and opportunity for travel.

d. These descriptions of a career as State Farm agent are consistent with the benefits of the career described in State Farm's own publications. For example:

(1) State Farm recruiting brochures describe the agent position as providing "a career based on initiative and ability. Where the future is in the agent's own hands." Plaintiffs' Exhibit 8-7.

(2) State Farm's Career Presentation promises high income, security and satisfaction if one pursues a career in agency. Plaintiffs' Exhibit 8-10.

Objective Qualifications Requisite to Becoming a State Farm Trainee Agent

40. The testimony of defendants' regional vice presidents, deputy regional vice presidents, agency directors, and agency managers is that to become a trainee agent required no objective qualifications. Rather, certain specific objective disqualifications preclude individuals from becoming trainee agents. These specific disqualifications include:

a. Failure to pass the AIB Examination, applicable to women only since April 19, 1978;

b. Failure to qualify for State Farm automobile insurance;

c. A prior felony conviction; and,

d. Failure to pass a physical examination.

41. Regional Vice Presidents Donald Raker and Roger Tompkins, Deputy Regional Vice President for Northern California Ray Wehde, and Agency Managers Warren Buckingham and Roy Soik all agreed that the following were *not* required to become trainee agents:

a. *Education.* Regional Vice President Raker, Deputy Regional Vice President Wehde, and Agency Managers Soik and Buckingham each testified that there were no minimal educational requirements to become trainee agents. In fact, Agency Manager Soik testified that an individual need not go beyond the eighth grade to become a State Farm agent. This testimony is corroborated by Plaintiffs' Exhibit 2-9, which indicates the wide range of educational experience of agents appointed between 1970 and 1981. In fact, as Plaintiffs' Exhibit 2-9

indicates, only 46.7% of the agents appointed between 1970 and 1981 had a bachelor's degree or higher.

b. *Prior work experience.* The testimony is uncontradicted that no specific work experience is required to become a trainee agent. Agency Manager Buckingham testified that prior insurance experience was not required. Regional Vice President Tompkins testified that it is preferred that a prospective trainee agent *not* have prior insurance experience. Regional Vice President Raker testified that successful trainee agents came from "every walk of life."

The testimony of defendants' management witnesses as to the diversity of backgrounds of State Farm agent is confirmed by Plaintiffs' Exhibit 2-10 which shows that agents had engaged in 113 different occupations prior to their appointment, including such nonrelated employment as barber and beer distributor. Similarly, Plaintiffs' Exhibit 119 reflects the same broad range of prior work experience.

c. *Net Worth.* Similarly, Messrs. Wehde and Buckingham each testified that an individual did not need any particular net worth to become a trainee agent. Defendants' own Career Presentation used to explain trainee agency to prospective candidates confirms that no minimum net worth is required. Plaintiffs' Exhibit 8-10 at p. 19.

d. *Marital status, friendship, organizations.* Regional Vice President Tompkins and Agency Manager Buckingham each testified that no particular marital status, friendships or organizational associations were required to become a trainee agent.

42. The lack of objective qualifications to become a trainee agent is reflected in the diverse backgrounds of successful State Farm agents, some of whom testified for defendants at trial. Defendants' testimony and personnel files of State Farm agents in evidence confirm that success as a trainee agent does not depend on a college degree or prior insurance experience. High school graduates, secretaries, housewives, and individuals facing extremely difficult personal problems are all potential successful trainee agents. These conclusions apply to both male and female agents. For example:

a. Career agent Linda Leaming is a high school graduate with two years of junior college. Prior to becoming a trainee, she worked as a secretary to State Farm agent Larry Konecne and before that as a secretary at an oil company. At the time of her appointment, she had five children and a husband who was totally disabled.

b. Career agent Judy Semler had no college degree and had previous experience as a rate clerk in an insurance company and as a waitress. Prior to becoming a trainee agent, she was secretary to State Farm agent Bill Kibbie. Ms. Semler was not married when she became a trainee agent.

c. Career agent Tempe Javits' previous work experience included being a file clerk and secretary to a structural engineer. Prior to becoming a trainee agent, she was a sales agent for the California State Automobile Association.

d. Career agent Carol Newland has a Bachelor of Science degree in home economics and taught school before becoming a successful trainee agent. Ms. Newland

is divorced, and testified that at the time of her appointment, she was living "hand to mouth."

e. Phyllis Frank is a high school graduate. She was a librarian, house-wife, and secretary to career agent Robert Anderson before becoming a successful trainee agent.

f. Jeane Triby Sullivan was a housewife and mother when she became a trainee agent.

g. Linda Moore worked in State Farm's Florida Regional Office as an underwriting assistant, machine operator, policy checker, forms control clerk and personal lines underwriter before becoming a trainee agent. At the time of her appointment, Linda Moore described herself as a "classic case of failure" in that she had no college degree, no friends or contacts in California, and no stable employment. Nonetheless, Linda Moore's success is attested to by the fact that she became State Farm's first female agency manager in the United States in 1981.

h. Agent William Cortland Lancaster (son-in-law of agent Hy Fegatill) had no college degree, limited finances, and worked for a mortgage company when he was appointed a trainee agent. Plaintiffs' Exhibit 65-39.

i. Agent Lawrence Pirrone's (son of Agency Manager Manny Pirrone) prior employment experience included laborer, bulk chemical handler, administrator at a law firm and agent with an Iowa insurance company. Plaintiffs' Exhibit 64-71. Agency Manager Madsen described his finances as "not too liquid."

j. Agent Ken Anderson had no sales experience and had previously worked in an aerospace company that

went bankrupt, and as a product sales manager. He also owed $27,000 to his father when appointed. Plaintiffs' Exhibit 63-2.

k. Agent Glenn Johnson has a college degree and previously worked as a tire changer, custodian, and office manager and solicitor in a State Farm agency for eight months. Plaintiffs' Exhibit 64-49.

l. Agent Roger Wilson worked as a manager and as a buyer in a large department store in Dayton, Ohio before coming to California at his father's behest to become a trainee agent. Plaintiffs' Exhibit 63-65.

m. Richard Edward Cook was a P.E. Instructor at the YMCA when appointed a trainee agent.

n. Agent Billy Wehde (son of Deputy Regional Vice President Ray Wehde) had never lived in Monterey, where he was appointed a trainee agent, had no community contacts there, had nearly no assets, and his prior job experience was as waiter, manual laborer, and underwriting clerk, for six months. Plaintiffs' Exhibit 64-1.

Compensation of Trainee Agents

43. During the two year training period the trainee agent is an employee of defendants and receives a monthly payment call the Specified Monthly Payment (hereinafter "SMP").

44. The amount of the SMP received by a particular trainee agent is calculated on a Monthly Budget Worksheet (defendants Exhibit 180-2) which is completed during consultation between the prospective trainee agent and his agency manager. The amount of the SMP takes

into account the prospective trainee agent's personal expenses and his or her projected expenses in setting up an office. Regional Vice President Roger Tompkins testified that the resulting SMP typically covers most, if not all, of the trainee agent's projected agency expenses including rent, supplies and secretarial costs.

45. During each month of trainee agency, the trainee agent is required to "validate" a portion of his SMP through commissions earned. For example, in January 1979, trainee agents were required to validate 5% of their SMP in the first month of their trainee agency graduating to 50% in the 24th month. Thus, if an SMP is $1,500 per month, the trainee agent must earn at least $75.00 in commission in the first month to "validate" and $750.00 in commissions in the 24th month to "validate." The commissions of the trainee agent are cumulative from month to month in determining whether a trainee agent has validated.

46. If a trainee agent does not earn enough commissions to "validate" he does not have to reimburse the company for the difference between the commissions required by the validation schedule and commissions earned. Failure to validate from month to month, however, may impact whether a trainee agent continues his employment.

47. Failure to validate, however, rarely occurs. Regional Vice Presidents Raker and Tompkins testified that nearly 100% of all trainee agents validate their contracts. Vice President Raker testified that at the time of trial 100% of his agents were validating. Agency Manager Buckingham also testified that nearly 100% of all agents

validate. Each testified that their conclusions apply equally to male and female trainee agents. See paragraph 88.

48. Although trainee agents do not pay back the difference between commissions required for validation and commissions actually earned they can keep all excess commissions earned above the required sums for validation. As Regional Vice President Raker explained, excess commissions may be earned on sale of all State Farm's multiple lines of insurance. Raker testified that in his experience every trainee agent who validates earns excess commission.

49. The excess commissions earned do not diminish the amount of the SMP.

50. The testimony of Regional Vice President Raker is consistent with the testimony of former and current trainee agents called by defendants who *all* testified that they earned excess commissions during their trainee agency period. (e.g., See testimony of Agents Tempe Javitz, Jean Triby Sullivan, Carol Newland, and Phyllis Frank.)

51. Since September 1982, State Farm trainee agents also are subsidized by payment of bonus compensation on top of their SMP and excess commissions.

52. Trainee agents are subsidized further by the availability of 3% loans from defendants to set up their offices. In some instances, trainee agents share existing facilities with State Farm career agents or agency managers to lessen any financial burden during the training period.

53. Although defendants maintain that a substantial investment is required to become a trainee agent, the evidence supports the finding that trainee agents' gross receipts (including SMP, excess commissions, and other compensation received from defendants) exceed their expenses and that on the average, trainee agents made a net profit during their training period. The testimony of defendants own witnesses, Career Agents Javitz, Newland, Sullivan and Trainee Agent Frank, as well as defendants' own documentary evidence, support this conclusion. For example:

a. Career agent Sullivan testified that her trainee agency lasted from May 1975 to May 1977 during which time she received an SMP of $800 per month. She testified that in her first year of trainee agency she had expenses of between $800 and $1,000 per month. She testified that because of earnings from excess commissions she never experienced a monthly loss and never had to borrow. She described the start-up costs of a trainee agent as a "pencil, reverse directory and telephone." She testified that her income increased steadily to the point that she now nets in excess of $40,000 per year.

b. Career Agent Javitz, who was a trainee agent from September 1979 through September 1981, testified that her gross income exceeded her expenses during her entire period of trainee agency except for the first three months. By the last three months of her trainee agency, her income exceeded her expenses by seven thousand dollars. She never took a loan to support herself as a trainee agent.

c. Career agent Newland testified that she initially shared office space with her agency manager and that as a consequence, "it didn't cost anything to set up an office." She testified that after two years she was netting the same $17,000-$20,000 dollars per year that she earned as a school teacher prior to becoming a trainee agent.

d. Trainee agent Frank testified that she had to take a $25,000 loan to finance her trainee agency which began June 1, 1981. A close examination of her financial earnings and expenses during her period of trainee agency, however, reveals that $6,000 of the $25,000 went to pay personal debts and that thousands of dollars were spent on expensive china and pottery which she expensed through her office. The record also reflects that by April 1982, the 10th month in her trainee agency, she grossed $2,000 and the following month $2,300. She testified that she expected the upward trend to continue.

e. Linda Moore, who is currently State Farm's *only* female agency manager, corroborated the foregoing testimony with respect to the trainee agents she supervises and her own experience as a trainee agent. With respect to the former, she testified that nearly all her trainee agents earn excess commissions and some as much as $1,200-$1,500 dollars per month. She testified that most problems of trainee agents are personal rather that financial.

With respect to her own experience as a trainee agent, the record reflects that Ms. Moore became a trainee agent in April 1977. For 1978, her first full calendar year as a trainee agent, she showed a net profit on her tax return. See Plaintiff's Exhibit 124. By 1979, the end of her trainee agency she showed a net profit of approximately $11,000. Her net profit nearly doubled the following year. At the present time she is a successful agency manager.

f. The experiences of these agents with respect to the investment required to be a trainee agent and the expenses of a trainee agent are consistent with the testimony of Agency Manager Warren Buckingham who testified that "as a rule of thumb" trainee agent expenses were 25-30% of his or her gross compensation.

g. The only other defense witness who testified regarding compensation as a trainee agent was Agency Manager Gerald A. Estabrook. Although he testified that his investment as a trainee agent was in the range of $40-$45,000 dollars, the fact must be considered in light of

his testimony that during his training period, he was divorced. As a result of the divorce, he had a lot of added personal expenses that he had not anticipated when he became a trainee agent. He estimated that 35% of the $40-$45,000 went for those expenses.

54. Finally, Defendants' Exhibit 131.2, a survey prepared by defendants for use at trial, attempts to determine the average net compensation of trainee agents and career agents by comparing their gross compensation and expenses. The results of the survey, *proffered by defendants,* flatly contradict defendants' assertion that trainee agents suffer substantial financial losses during their two years as trainee agents.

55. Plaintiffs' Exhibit 2-13 specifies the average gross earnings of trainee and career agents based on years of service. The dollar figures in Plaintiffs' Exhibit 2-13 are uncontradicted in the record and conclusively show that the average gross earnings of a trainee agent after one year of service were $24,836.03 and the average gross earnings of a trainee agent after two years of service were $41,877.93. Page 7 of Defendants' Exhibit 131.2 indicates that expenses for the first year as a trainee agent are, on the average, $12,360.00 (12 x $1,030) and $15,770.00 (12 x $1,310) in the second year. Thus, a trainee agent nets, on the average, $12,476.03 in the first year ($24,836.03 - $12,260) and $26,257.93 ($41,877.93 - $15,720) in the second year.

56. Alternatively, if one disregards Defendants' Exhibit 131.2 and uses Agency Manager Buckingham's estimate that expenses are 25-30 percent of an agent's gross income, a trainee agent's average net income in the first year is $17,385.22 ($24,836.03 gross; expense factor

30%) and $29,314.55 in the second year (gross $55,646.97; expense factor 30%).

Compensation of Career Agents

57. The compensation of State Farm career sales agents depends entirely on the amount of their insurance sales, service fees, and renewals.

58. For each of the years 1974 to the present, the yearly average gross compensation for all State Farm career agents throughout the State of California was as follows:

1974	$34,150.52
1975	$38,786.46
1976	$47,392.26
1977	$57,392.26
1978	$67,217.50
1979	$74,556.50
1980	$80,780.06
1981	$83,835.44

59. Plaintiffs' Exhibit 2-13 also specifies the average gross earnings of career agents based on years of service. These dollar sums which are also uncontradicted in the record, conclusively demonstrate that the average gross earnings of individuals who had been career agents for one year was $55,646.97, for two years $66,743.37, for three years $67,628.06, and four years $78,227.08. Individuals who had been trainee agents for ten years had average gross earnings of $87,778.72.

60. Page 7 of Defendants' Exhibit 131.2, read in conjunction with Plaintiffs' Exhibit 2-13, yields the following average *net* income for career agents: $36,566.97 after the first year as a career agent ($55,646.97 -$19,080 in

expenses); $44,915.37 after the second year as a career agent ($66,743.37 - $21,828 in expenses); $43,052.06 after the third year as a career agent ($67,628.06 - $24,576 in expenses); and, $52,055.08 after the fourth year as a career agent ($78,227.08 - $26,172 in expenses).

Alternatively, application of the Buckingham 30% factor yields an average net income of $38,952.88 after the first year as a career agent (gross $55,646.97); $46,720.36 after the second year (gross $66,743.37); $47,339.64 after the third year (gross $63,628.06); and, $54,758.96 after the fourth year (gross $78,227.08).

Compensation of Agency Managers

61. The compensation of State Farm agency managers is based on the commissions of the State Farm career agents and the trainee agents who they supervise.

62. Agency Manager Warren Buckingham testified that he was earning approximately $125,000 dollars per year.

63. If a career agent becomes an agency manager he is entitled to "termination" payments for a period of five years. Said termination payments are based on the individual's prior sales as a career agent. For example, Agency Manager Gerald E. Estabrook testified that he netted $40,000 as an agency manager in 1979 (less than 5 years after starting as a trainee agent); $48-$50,000 in 1980; and $56,000 in 1981. Also, he received an additional $7,000 each year as termination payments, and will receive $7,000 in termination payments for 1982 and 1983.

The Sexual Composition of State Farm's Management, Career Sales Agents, Trainee Agents, Solicitors, Office Managers, Agency Secretaries, and Operations Division from 1970 to 1981

64. Since 1970, State Farm has never had a woman in the position of vice president, deputy regional vice president, agency director or agency manager except for one woman agency manager hired in October 1981. (Plaintiffs' Exhibit 2-4).

65. The sexual composition of State Farm Agency Management from 1970 to 1981 is reflected in the following statistics:

BREAKDOWN BY SEX OF MANAGERS, DIRECTORS AND VICE PRESIDENT POSITIONS
(PLAINTIFFS' EXHIBIT 2-4)

Year	Total	Other	Men	Women	% Men	% Women
1970	74	0	74	0	100.0	.0
1971	85	0	85	0	100.0	.0
1972	94	0	94	0	100.0	.0
1973	99	0	99	0	100.0	.0
1974	103	0	103	0	100.0	.0
1975	106	0	106	0	100.0	.0
1976	107	0	107	0	100.0	.0
1977	112	0	112	0	100.0	.0
1978	120	0	120	0	100.0	.0
1979	126	0	126	0	100.0	.0
1980	141	0	141	0	141.0	.0
1981	155	0	154	1	99.4	.6

66. During the period 1972 through 1981, the work-force composition of State Farm sales agents (all agents, including trainee agents and career agents), by sex was as follows:

AGENTS ACTIVE AT YEAR END
(PLAINTIFFS' EXHIBIT 2-3)

Year	Total	Women	%	Men	%
1970	1128	1	.1	1127	99.9
1971	1193	1	.1	1192	99.9
1972	1307	1	.1	1306	99.9
1973	1386	1	.1	1385	99.9
1974	1454	2	.1	1452	99.9
1975	1536	6	.4	1530	99.6
1976	1594	6	.4	1588	99.6
1977	1657	7	.4	1650	99.6
1978	1708	19	1.1	1689	98.9
1979	1792	39	2.2	1753	97.8
1980	1825	54	3.0	1771	97.0
1981	1847	65	3.5	1782	96.5

67. During the period 1970 through 1981, the new hires of State Farm trainee agents, by sex, were as follows:

AGENT NEW HIRES, BY DATE OF HIRE
(PLAINTIFFS' EXHIBIT 2-6)

Hire Date	Total	Women	%	Men	%
1970	104	0	.0	104	100.0
1971	92	0	.0	921	100.0
1972	150	0	.0	150	100.0
1973	128	0	.0	128	100.0
1974	126	1	.8	125	99.2
1975	130	6	4.6	124	95.4
1976	94	3	3.2	91	96.8
1977	95	1	1.1	94	98.9
1978	83	12	14.5	71	85.5
1979	125	24	19.2	101	80.8
1980	126	24	19.0	102	81.0
1981	118	24	20.7	94	79.3

68. During the period 1970 through 1981, State Farm hired 1980 trainee agents, of which only 95 (6.9%) were women. (Plaintiffs' Exhibit 2-6).

69. During the period July 5, 1974 through 1981, State Farm hired 821 trainee agents, of which 94 (11.4%) were women. (Plaintiffs' Exhibit 2-6).

70. State Farm career sales agents and trainee agents employ thousands of individuals as solicitors, office managers and secretaries throughout the State of California, nearly all are women.

71. The vast majority of all applicants for positions in operations since 1970, numbering approximately 35,000, were women.

Since 1970, the overwhelming majority of all employees in operations were women. This conclusion is reflected by the following table:

STATE FARM COMPOSITION
AT YEAR END, OPERATIONS
(PLAINTIFFS' EXHIBIT 2-3)

Year	Total	Men	Women	% Women
1970	2032	962	1070	52.7
1971	2443	1086	1357	55.5
1972	2593	1119	1474	56.8
1973	2813	1141	1672	59.4
1974	3043	1196	1847	60.7
1975	3074	1192	1882	61.2
1976	3385	1234	2151	63.5
1977	3954	1354	2600	65.8
1978	4261	1449	2812	66.0
1979	4426	1489	2937	66.4
1980	4410	1512	2898	65.7
1981	4491	1540	2951	65.7

72. For the years 1970 through 1981 State Farm has hired 11,304 employees in their operations division within the State of California. Of those 11,304 employees, 9,448 (83.6%) were women. (Plaintiffs' Exhibit 2-5).

The Relative Availability of Females for the Position of State Farm Trainee Agent

73. Professor John H. Pencavel testified to the relative percentages of women available for the position of trainee agent.

74. The Court qualified Professor Pencavel as an expert pursuant to Federal Rule of Evidence 702 on the subjects of labor supply and availability.

75. Professor Pencavel's resume is Plaintiffs' Exhibit 1-1 and reflects that:

a. Professor Pencavel is a full Professor in the Department of Economics at Stanford University where he has taught graduate and undergraduate courses in labor economics, economic theory and econometrics since 1969;

b. Professor Pencavel's educational background includes a Bachelor Science in Economics from the University of London; Master of Science in Econometrics, Economic theory and International Trade from the University of London; and a Ph.D. from Princeton University in Economics;

c. Professor Pencavel has written articles for over ten publications in the field of labor economics including the *Journal of Political Economy*, the *Journal of Economic Literature*, *Economika*, and the *Journal of Econometrics*;

d. Professor Pencavel has consulted and/or testified as a labor economist in other Title VII cases including Hawkins v. Carter Hawley Hale Stone, Inc. (N.D. Cal. C 71-2137 RHS); Gay v. Waiters Union, Local 30, 22 FEP Cases 280 (N.D. Cal. 1979) aff'd 694 F.2d 531, 30 FEP Cases 605 (9th Cir. 1982); Walker v. Sears, Roebuck & Company, C 76-2305 AJZ and I.M.A.G.E. v. Bailar, C 76-1979 ACW).

76. Professor Pencavel prepared a report for use in this trial in March 1982, entitled Analysis of Relative Availability of Females as Sales Agent Trainees by State Farm Insurance Companies. Plaintiffs' Exhibit 1-2.

77. Professor Pencavel's testimony and report presented the results of his analysis of the availability of women for hire and training as trainee agents in California by State Farm Insurance Companies. Specifically, Professor Pencavel sought to derive a reliable estimate of the percentage of women in the pool of individuals available and qualified for employment as trainee agents in California by State Farm Insurance.

78. The sources of data used by Professor Pencavel included:

a. 1970 Census of Population, *General Social and Economic Characteristics, California,* PC(1)-C6, U.S. Department of Commerce, Bureau of the Census (April 1972).

b. 1970 Census of Population, *Detailed Characteristics, California,* PC(1)-D6, U.S. Department of Commerce, Bureau of the Census (November 1972).

c. Summaries of gross earnings of State Farm's independent contractors.

d. *California Statistical Abstract*, Employment Development Department, Sacramento (issues for 1971, 1972, 1973, 1975 and 1980).

e. *Current Population Survey, May 1979*, U.S. Bureau of the Census, Washington, 1980 (available on computer tape).

79. In reaching his conclusions, Professor Pencavel considered a number of different concepts of relative female availability to insure a reliable estimate, one that is not "sensitive to the particular criteria chosen." Pencavel Report at pp. 2-3.

80. Professor Pencavel concluded that the percentage of women available for the trainee agent position for the period 1970 through 1981 is "between 35 and 45 percent with a central tendency of 40%." Pencavel Report at p. 19.

81. In arriving at his estimates of relative Female availability, Professor Pencavel began with very broad concepts or criteria of availability that he subsequently amended and refined to insure a reliable estimate of relative female availability that is "not the product of some idiosyncratic definition of the relevant labor market . . . . " Pencavel Report at p. 3. As is explained below, Professor Pencavel's amendments and refinements of his concepts and criteria for the determination of relative female availability are consistent with State Farm's actual practices with respect to the hiring of trainee agents.

82. Specifically, Professor Pencavel determined that the percentages of the availability of women to be trainee agents ranged from 29.0% to 59.5% with an average of

approximately 40%. The specific percentages of relative female availability were derived in part as follows:

a. Professor Pencavel calculated from the 1970 Census of Population the percentage of females aged 19 to 65 years in California's population and the percentage of females aged 16 years and over employed in California who satisfied certain educational criteria. The results of this analysis were:

		1970	
		Population	Employment
(1)	At least 4 years of high school	50.7	39.8
(2)	At least 1-3 years of college	44.6	35.3
(3)	At least 4 years of college	39.0	30.7

b. Professor Pencavel updated the availability percentages obtained in (a) above to May of 1979 by using Current Population Survey conducted by the Bureau of the Census for the Bureau of Labor Statistics. The updated percentages of relative availability of women were:

1979

	Aged 19-65 years		Aged 16 yrs. and above	
	Population	Employment	Population	Employment
At least 4 years of high school	52.0	44.1	53.2	44.2
At least 1-3 years of college	45.7	38.7	46.9	38.8
At least 4 years of college	42.5	35.9	44.4	36.0

c. Professor Pencavel refined and narrowed the availability percentages in (a) and (b) above by cross-classifying individuals by educational attainment *and* occupation. Specifically, Professor Pencavel sought to determine the percentages of women with the educational attainments in (a) and (b) above who also fell into one of two occupational groupings: (1) Group I consisting of professional and technical workers; non-farm managers and administrators; and sales workers; and (2) Group II consisting of all those employed in Group I plus workers in clerical and kindred occupations. Group I included such diverse occupations as librarians, nurses, social and welfare workers, teachers, store buyers, store floor managers, insurance agents and brokers, and real estate agents. Group II included occupations such as bank tellers, bookkeepers, insurance adjusters and examiners, secretaries, and real estate appraisers. Professor Pencavel testified that the two groups together constitute "white collar workers." By cross-classifying these educational requirements with these job groups, Professor Pencavel obtained the following percentages of relative female availability as of 1970:

1970	Occupation Group I	Occupation Group II
At least 4 years of high school	31.5	47.4
At least 1-3 years of college	29.3	39.0
At least 4 years of college	29.0	31.6

d. Professor Pencavel updated these percentages for 1979 in a manner similar to (b) above. The availability percentages for 1979 were:

1979	Occupation Group I	Occupation Group II
At least 4 years of high school	36.9	50.6
At least 1-3 years of college	32.9	40.3
At least 4 years of college	31.2	34.4

83. Professor Pencavel corroborated his availability analysis by taking into account educational levels and earnings of State Farm career agents, as follows:

a. Professor Pencavel assumed that the supply/availability of labor/workers to any work activity depends on the activity's terms of employment. Professor Pencavel testified that the most obvious condition influencing interest in the particular position is the wage paid, the assumption being that all things equal, individuals will gravitate towards those jobs that pay more.

b. Professor Pencavel used net earnings data from the 1970 Census and compared it with the estimate net earnings of State Farm career agents in 1969 calculated to be approximately $15,000 dollars.

c. Professor Pencavel assumed that the percentage of women in 1969 earning less than $15,000 would be potential candidates for employment as State Farm trainee agents. In addition, Professor Pencavel took into account the fact that certain individuals would not want to become career agents (if earning $8,000 or more) while some individuals earning more money would be willing to become trainee agents if earning up to $25,000.

d. Based on these assumptions Professor Pencavel arrived at the following availability percents:

	With Annual 1969 income less than		
	$8,000	$15,000	$25,000
At least 4 years of high school	59.5	47.6	44.7
At least 1-3 years of college	59.6	45.2	41.0
At least 4 years of college	56.3	44.5	37.4

e. Professor Pencavel updated the figures in (d) above by using May 1979 data from the Bureaus of the Census and Labor Statistics. The updated figures assume a State Farm agent's 1978 net median earnings to be $37,029 and his or her mean net earnings to be $40,683. Professor Pencavel further assumed that certain individuals earning as little as $20,000 would not be willing to become State Farm agents and that other individuals earning as much as $60,000 would be willing to become agents. Based on these assumptions, Professor Pencavel arrived at the following relative percentages of women available for hire as trainee agents:

	With Annual 1978 Earnings Less than			
	$20,000	$37,000	$40,000	$60,000
At least 4 years of high school	48.1	45.1	45.0	44.5
At least 1-3 years of college	43.2	39.8	39.7	38.9
At least 4 years of college	41.3	37.2	37.1	36.0

f. Professor Pencavel's earnings analysis simply corroborates his other availability figures. In fact, the availability estimates based on Professor Pencavel's earnings analysis are slightly lower than his estimates of the relative availability of females based upon population, education, and occupation categories. See paragraphs 81-82.

84. Professor Pencavel summarized his conclusions in the final paragraph of his report and testified to the same at trial.

A number of different concepts of relative female availability have been presented. The purpose of examining a number of different concepts is to insure that a robust estimate of female availability is arrived at, one that is not sensitive to the particular definitions chosen. In fact, these different concepts do not generate radically different estimates for availability; they cluster between 35 percent and 45 percent with a central tendency of 40 percent. (A simple average of the percentages tabulated from the 1979 current Population Survey is 40.9 percent and they range from 31.2 percent to 52.0 percent.) Therefore, the most plausible estimate of the fraction of adult women in the potential supply for State Farm's trainee agent positions in California lies between 35 and 45 percent.

Pencavel Report at p. 19.

85. Professor Pencavel's estimates of availability between 35% and 45% is also supported by the testimony of Agency Manager Linda Moore. She testified that in mid-1981, at a meeting of agency managers at State Farm's Northern California Regional Office, Deputy Regional Vice President Ray Wehde or one of the four agency directors present told the agency managers that

they would be expected to recruit 50% women. Ms. Moore testified that no one objected to this expectation and that she personally agreed with it.

86. Professor Pencavel's estimates of the relative availability of women for the trainee agent positions are based upon broad categories of availability that take into account levels of education and broad categories of workers. Professor Pencavel did not rely on specific categories of availability such as percentages of women real estate agents and insurance sales workers for the following reasons:

a. The trainee agent position is an entry level position for which no specific prior experience, including insurance sales work, is required.

b. The minimum objective requirements for the position include a broad range of available persons.

c. State Farm's recruitment documents indicate that a broad range of persons, including part-time workers and the unemployed, are sources of trainee agent recruits.

d. Professor Pencavel testified that the use of narrow categories such as insurance salesworkers is only appropriate if there is evidence that the company itself does not discriminate, an assumption not warranted in this case. R.T., April 1, 1982, 333:7-334:18.

e. Professor Pencavel's availability analysis does not conflict with State Farm's actual hiring practices. State Farm draws its trainee agents from virtually every walk of life and with varying educational backgrounds. Professor Pencavel testified that if one limited availability

to narrow groups such as insurance salesworkers or individuals with particular educational backgrounds, "clearly you would be excluding a large number of people that State Farm demonstrates . . . [it] is willing to hire." R.T., April 1, 1982, 3391:15-17.

87. In fact, the categories upon which Professor Pencavel based his estimates of relative female availability mirror the categories used by State Farm in hiring trainee agents. This similarity is evident from information maintained on defendants' computer tapes, from defendants' recruitment brochures, and from testimony at trial. For example:

a. Data from defendants' computer tapes supports Professor Pencavel's use of broad educational categories. Only 46.7 percent of State Farm agents have attained a bachelor's degree or above.

b. State Farm's Training the Trainer Topics (Plaintiffs' Exhibit 28), promulgated by defendants in April 1978, contains a section entitled "Prospecting for Female Agents" that lists the following broad "excellent sources of candidates":

- Relatives and associates of agents
- Office employees of agents
- Agents' policyholders
- Female salespeople
- Regional or claims office employees
- Real estate employees
- Retail store employees
- Other insurance company employees

- Travel bureau employees
- Hotel/resort employees
- Door-to-door sales people such as Avon, Tupperware, and Sarah Coventry representatives
- Individuals and professional organizations such as the League of Women Voters and National Secretaries Association
- Service business employees including employees of banks, savings and loan associations, credit unions, loan companies
- Nurses and hospital employees
- Individuals in community organizations such as churches, the Red Cross, political campaigns, historical societies
- Individuals experiencing changes in economic situations such as being widowed, divorced, sending a last child to college, or deciding on a change in career
- Women in offices including office managers, receptionists, department managers, and bookkeepers
- Women proprietors and managers of advertising agencies, antique shops, boutiques, employment agencies, gift shops.

c. State Farm's Agency Manager Pre-Contract Guide and and [sic] Text (Plaintiffs' Exhibit 31) instructs agency managers that they will find new agents in "most any acceptable and reputable occupations." The Guide suggests that individuals who are "vocationally or economically disturbed or disturbable in their present jobs" or are "in search of a career" should be the principal targets of State Farm Agency Manager recruitment efforts. See

generally, Chapter 3, Plaintiffs' Exhibit 31. The broad range of job categories suggested as potential sources of candidates by these guidelines include:

- Individual proprietors
- Chain store managers and assistants
- Junior accountants and law partners
- People in family-owned business
- People in elective or appointed positions
- Teachers and athletic coaches
- Trainees in large corporations
- Bank employees
- Successful people in unsuccessful or declining businesses

d. State Farm's data indicates that their actual hiring practices mirror their admonitions to agency managers to hire agents from "all walks of life." Thus, Plaintiffs' Exhibits 2-10 and 119, reflect that the prior work experience of State Farm agents includes such diverse occupations as barbers, beauticians, amusement workers, editors, systems analysts, bus drivers, restaurant managers, liquor distributors, beer distributors, as well as insurance salespersons. In fact, only 19.2% of trainee agents had previous experience as insurance agents.

88. Professor Pencavel's conclusions with respect to the relevant percentage of the availability of women to be trainee agents are not altered by the various characteristics and "qualities" State Farm claims are required for appointment and success as trainee agents. That is, there

is no evidence that any particular personal characteristics relevant to employment as State Farm trainee agents screen out relatively more women that men. This finding is corroborated by the testimony of Professor Pencavel, the testimony of numerous defense witnesses including State Farm agents, by defendants' expert witnesses, and by State Farm's published materials regarding women trainee agents. For example:

a. Professor Pencavel testified that the following characteristics claimed by State Farm to be relevant to the appointment and success of trainee agents do not tend to screen out a greater number of women than men or affect the relative availability of women:

- The fact that an individual incurs expenses in conducting business.
- The fact that setting up an office requires an initial expenditure.
- The fact that five to twelve months may separate applying for a position and the actual hiring.
- The fact that the position requires good health.
- The fact that a person must be 18 years old to obtain a state license.
- The fact that an individual not be a convicted felon.
- The fact that State Farm trainee agents have a high rate of success.
- The fact that the position may require commuting or travel.

- The fact that the position requires intelligence, leadership, technical ability, and initiative.

- The fact that the trainee agent position requires two years of training.

R.T., April 1, 1982, pp. 308-327.

b. State Farm's own publications, including Training the Trainer Topics, states:

The people we put on today must be of a caliber that assures us of their abilities to become professional, competent State Farm multiple line agents. These people come in all sizes, colors, backgrounds, and from *both* sexes.

Plaintiffs' Exhibit 28 at p. 4 (emphasis in original).

The document concludes that with respect to validation as trainee agents: "It is interesting to note that *validation* percentages . . . *favor females* in every category." at p. 7, (emphasis in original)

c. The testimony of defendants' regional vice-presidents, deputy regional vice-presidents, agency managers and agents corroborated the fact that the characteristics alleged to be relevant to the position of trainee agent do not tend to exclude women in greater proportions than men and do not affect the relative availability of women to be trainee agents. For example:

(1) Regional Vice-President Raker testified that the qualities found in "success patterns" such as initiative, honesty, integrity, stick-to-itiveness, ability to work 60-70 hours per week, and ability to obtain cash were equal for men and women.

(2) Defendants' Regional Vice-President for Southern California, Roger Tompkins, testified that he knew of no difference between men and women with respect to the following characteristics and abilities:

- initiative
- integrity
- intellectual capability
- ability to withstand abrasiveness and rejection
- ability for sales.

Regional Vice-President Tompkins also testified that he had no reason to believe that State Farm would not maintain its number one ranking in casualty sales if 50% of the agents were women. Nor did Tompkins believe that the compensation of agency managers or career agents would decrease if there were more women agents. He further testified that women trainee agents do as well as men.

(3) Deputy Regional Vice-President Ray Wehde testified that women have "success patterns" equal to that of men. He further testified that the fact that the position of trainee agent required weekend work, night work, and long hours, would not tend to screen out women in greater numbers than men.

(4) Agency Manager Linda Moore testified that "the right person" can be a successful career agent whether male or female. Agency Manager Moore believed that the qualities of commitment, sacrifice, and need for financial investment do not tend to screen out women in greater proportions than men. Agency Manager Moore also testified that the risk and rejection involved in being a trainee agent would not affect women in greater proportion than men.

(5) Agency Manager Gerald E. Estabrook testified that the same percentage of women as men stay in and complete the selection process.

(6) Agency Managers Denny Duray, Joe Fernandez, and Paul Bush testified that women do as well as men in State Farm's agent training courses.

(7) Career Agent Jean Tryby Sullivan similarly testified that the trainee agent position is not more suited to a man than a woman, and the fact that she considered it a difficult job would not tend to screen out women in greater numbers than men. She also testified that the long hours involved in being a trainee agent discouraged men and women in equal proportions.

(8) Career Agent Judy Semler testified that she attended a panel discussion at State Farm's Headquarters in Bloomington, Illinois, concerning women as agents. At the discussion, the panelists agreed that despite long hours, family commitments, and personal risks, women could be agents in numbers equal to men. She characterized the "excuses" why women could not be agents as "myths."

(9) Even defendants' availability expert, Elizabeth Milrod, testified that she knew of no difference between men and women with respect to the following characteristics and abilities:

- ability to manage time
- drive and energy
- financial ability to become trainee agents
- ability to learn and retain material
- ability to meet and relate to people

- ability to plan well and establish realistic goals
- aptitude for insurance sales and potential to perform the duties of a trainee agent
- interest in high income, security, and the satisfaction of working as a private business-person
- ability to complete assignments in a timely manner
- ability to maintain a strong ego and handle rejection
- desire to increase income each year
- desire to advance rapidly within a career
- desire for the security of a career in trainee agency which includes selling highly regarded products, receiving personal help in getting started, and having the benefit of an aggressive promotional support system
- the desire to receive satisfaction by contributing to the welfare of others
- the desire for recognition in the community
- the ability to sell insurance.

R.T., July 6, 1982, pp. 534-562

Defendants' Criticisms of Professor Pencavel are Inaccurate and/or Without Consequence

89. Professor Pencavel did not assume that the personal qualities sought by State Farm in its trainee agents are generally present or universal throughout the population. Professor Pencavel testified that the qualities that

State Farm seeks in fact may not be present in everyone, but there is no reason to believe that men have these qualities in greater proportions than women. Defendants presented no evidence to support a contrary conclusion. e.g., R.T., April 1, 1982, p. 350.

90. Defendants presented no evidence indicating that the qualities they seek in their trainee agents are found in only a small percentage of the population, or that the relative percentage of men and women having these qualities differs.

91. Similarly, plaintiffs' reliance on defendants' Exhibits 2-10 and 119 specifying the broad range of prior occupations engaged in by State Farm agents does not assume that each and every individual in a particular occupation is interested in becoming a trainee agent. Instead, Professor Pencavel testified that the relative proportions of men and women in each occupation interested in becoming trainee agents would not be equal. Defendants presented no evidence to support a contrary conclusion.

92. Defendants' criticism of Professor Pencavel's educational and occupational refinements of his availability analyses is not supported by the record. For example:

a. Defendants' statements that women constitute a minority of individuals in "big ticket" commission sales is irrelevant because:

(1) Prior "big ticket" or commission sales experience was not required to become a trainee agent; and,

(2) State Farm prefers individuals *without* prior sales experience. (Tompkins)

b. Similarly, the fact that a majority of women salesworkers are salaried employees in retail stores selling less expensive items is irrelevant to Professor Pencavel's conclusions. State Farm's own documents (plaintiffs' Exhibit 28) suggest that individuals in retail sales are "an excellent source of trainee agent candidates."

c. Defendants' criticisms of Professor Pencavel for including part-time and unemployed workers similarly ignore the sources from which State Farm actually draws trainee agents. Trainee agent appointments are made from part-time and unemployed individuals. Plaintiffs' Exhibits 2-10 and 119. One of State Farm's successful women agents, Jean Tryby Sullivan, was unemployed at the time she became a trainee agent, Paragraph 42.

d. Defendants' criticisms of Professor Pencavel's conclusions based on the supposedly small number of women with entrepreneurial experience is also without consequence.

(1) Entrepreneurial experience is not a requirement to be a trainee agent, and most State Farm agents had no entrepreneurial experience at the time of their appointments; (Plaintiffs' Exhibits 2-10 and 119), and

(2) The factual bases of defendants' conclusions are incorrect. In 1970, 25.9% of the self-employed salesworkers in California were women and in 1979, that figure had risen to 40.2%. See rebuttal testimony of Professor Pencavel. These percentages are consistent with the Pencavel Report and defendants' expert, Dr. Richard Singleton, conceded that the percentage of women in self-employed sales roles "might be useful" in evaluating labor market availability. (R.T., February 8, 1983, 60:19-61:8).

93. Although defendants reject Professor Pencavel's availability analysis and suggest that "refined" categories are more appropriate, the record reflects that:

a. Defendants failed to identify any "refined" categories that they felt accurately measured availability of women for the trainee agent position;

b. Defendants did not point out other appropriate data that Professor Pencavel failed to consider that would have changed or reduced the relative availability figures to which he testified; and,

c. When confronted with the sources for trainee agent recruitment set forth in State Farm's agency manager recruitment documents and asked whether the list sounded like a "wide net," Dr. Singleton conceded it "sounds pretty broad." R.T., February 8, 1982, 70:1.

94. Defendants' criticism of Professor Pencavel for failing to consider personal qualities thought to be relevant to success as a trainee agent is without consequence. The record contains no evidence that these personal qualities are not found in equal proportions among men and women. To the contrary, the testimony is virtually uncontradicted that the personal qualities State Farm says it seeks in its trainee agents are found equally among men and women. See paragraph 88.

95. Defendants criticized Professor Pencavel's conclusions, in part, because he did not know whether trainee agents worked pursuant to a written contract or were salaried, the length of precontract training, whether or not other insurance companies had comparable employees, and the amount of investment initially

required to become a trainee agent. Defendants' criticisms are without merit. No evidence indicates that these items affect the relative proportions of men and women available to be trainee agents.

96. While defendants criticize Professor Pencavel for ignoring factors that have *no* impact on his availability analyses, defendants' availability experts Elizabeth Milrod and Richard Singleton, ignored factors that depressed and distorted defendants' test-take flow. The critical factors and information ignored by defendants' availability experts include:

a. Admissions by defendants' management personnel that State Farm does not have applicants because State Farm "digs up" and finds "prospects" where they can. See paragraph 202.

b. Admissions by defendants' management personnel that certain agency managers would not hire women. See paragraph 203.

c. Admissions by defendants' management personnel that State Farm maintained virtually no records of individuals who expressed an interest in becoming trainee agents but who did not take the AIB. See paragraph 204.

d. The evidence supporting the inference that defendants engaged in discriminatory recruitment practices including:

(1) Evidence of defendants' reliance on word-of-mouth recruitment;

(2) Evidence of defendants' failure to post available trainee agent positions;

(3) Evidence of defendants' failure to advertise for trainee agent positions;

(4) Evidence of defendants' failure to recruit for trainee agents in areas where defendants themselves claim excellent trainee agent prospects are to be found, i.e., operations and among agents' employees;

(5) Evidence of defendants' use of nepotism;

(6) Evidence of defendants' perpetuation of an all-male image in its advertising;

(7) Evidence of defendants' reputation for not hiring women;

(8) Evidence of defendants' application of undefined multiple subjective criteria in the recruitment, selection, and hire of trainee agents. See generally, paragraphs 170-89.

(9) Evidence of defendants' own admissions regarding their failure to recruit women. See paragraph 137.

97. In addition, throughout the course of the litigation, defendants commissioned a study on the interest and availability of women to become trainee agents. Neither Ms. Milrod nor Dr. Singleton considered that study in reaching her or his conclusions regarding the availability of women for the trainee agent position.

98. Defendants criticize Professor Pencavel's conclusions because he assumed that the trainee agent position was an entry-level position in which individuals advance within the company. The criticism is without factual support because:

a. Defendants' agency management personnel have admitted that the trainee agent is an entry-level position. See e.g., testimony of agency manager Buckingham.

b. Defendants' documents support the proposition that the trainee agent job is an entry-level position that provides the opportunity for advancement. See paragraph 22.

c. The position if filled primarily by people outside the company.

d. Prior experience in the insurance industry is not required.

e. It is the first sales job in the agency ladder.

f. The trainee agent may progress to career agent and potentially to agency manager, agency director, deputy regional vice-president, and regional vice-president.

g. Defendants provided no evidence to indicate that the trainee agent position is not an entry-level job in which individuals train to become career agents with the possibility of future advancement.

99. Defendants criticized Professor Pencavel's earnings analysis for failing to take into account other forces at work in the marketplace, such as terms and conditions of employment. Yet, defendants presented no evidence to counter Professor Pencavel's testimony that the overwhelming study and research in the field of labor economics supports the thesis that the primary consideration that motivates individuals to a particular field of employment is potential earnings.

100. Defendants' criticize Professor Pencavel's earning analysis claiming that it does not take into account differences in earnings among trainee agents, between trainee and career agents, and among career agents and that it does not consider the investment required to become a trainee agent. The criticisms are without merit:

a. Professor Pencavel's earning analysis did take into account the fact that different earnings levels impacted availability. See paragraph 83.

b. Although the earnings of trainee agents and career agents differ and career agents' compensation varies, the record is uncontradicted that career agents net substantial incomes in their first year as career agents and excellent incomes by their third year. See Discussion re defendants' Exhibit 131.2, paragraphs 54-55 and compensation of career agents, paragraphs 57-60.

c. The defendants misrepresent the financial situation of trainee agents to the following extent:

(1) While prospective trainee agents receive no money from State Farm during precontract, the trainee agent candidate can carry on his or her employment. There is no testimony to indicate that precontract interferes with a prospect's employment.

(2) It is inaccurate that trainee agents make little or no money during their two years of training. See Compensation of Trainee Agents, paragraphs 43-55.

(3) Defendants ignore specified monthly payments given to every trainee agent and other financial assistance. See paragraphs 43-52.

(4) It is inaccurate that trainee and career agents invest substantial capital in becoming agents. See paragraphs 53-55.

Defendants' Explanations as to Why Women Constitute Such a Small Percentage of the State Farm Agency Force Are Without Factual Support.

101. Defendants suggest that the small number of women in defendants' agency force is explained by the fact that insurance sales is perceived as an unattractive career. The factual record does not support such a conclusion. Defendants' management personnel testified in glowing terms about the career. Regional Vice-President Raker characterized a career as a trainee agent as the "golden opportunity." Similarly, State Farm agents who testified at trial and State Farm's documents describe the agent's career as an opportunity for unlimited growth and income. (See paragraph 39). Defendants presented no evidence that the public perception of the career differed.

102. Defendants incorrectly assume that agency managers experience a general lack of interest by women in agency careers. To the limited extent that agency managers have sought women for a career in agency, women have shown an interest in pursuing the trainee agent opportunity. For example:

a. Agency Manager Gerald Estabrook testified that he established a booth at a Career Day in the Irvine area. He testified that 11 to 12 women signed up and expressed interest in further discussions. Agency Manager Estabrook also testified that he participated in recruitment seminars known as Success Action Seminars designed to attract women. He gave two lectures and

characterized the response as "tremendous." Other less successful efforts by Agency Manager Estabrook were either started too late (e.g., the Women's Exhibition at Anaheim Convention Center) or were face-to-face encounters and only involved leaving brochures at job placement centers (e.g., Saddleback College and University of California at Irvine).

b. State Farm's first and only female agency manager, Linda Moore, testified that her first appointment as a trainee agent was a woman and that her strongest candidate in a selection pool at the time of trial was a female, Robin Howard. She also testified that difficulties with respect to interest in and commitment to a career as a trainee agent applied equally to men and women.

c. Defendants' Deputy Regional Vice-President Ray Wedhe [sic] admitted that part of the explanation for the small number of women in State Farm's agency force lies with defendants' recruitment failures ("We haven't done enough to sell the career to women.") and not that women were disinterested. See paragraph 137.

d. At trial, defendants presented the testimony of six current women agents. Two of these agents (Javitz and Semler) actively sought careers as agents without being recruited by the company. The other four agents (Newland, Frank, Moore, and Sullivan) testified that the company first approached them to become agents. Once the company showed an interest, each woman committed herself to a career as an agent, successfully completed her precontract training, and is currently a successful State Farm agent. No evidence indicates that because they were

women, they had a more difficult time committing themselves to a career in agency or were less interested in becoming agents. In fact, some of these women committed themselves to a career in agency despite difficult family situations. See paragraph 42.

103. Defendants' suggestion that women's previously lower levels of education explain their small numbers in State Farm's agency force in inaccurate:

a. The testimony is uncontradicted that there are no educational requirements to become a trainee agent; See paragraph 41a, and

b. In any event, Professor Pencavel accounted for educational levels in his availability analyses. See paragraph 82.

104. Defendants' suggestion that various unnamed "protective laws" accounted for the small number of women in defendants' agency force is without factual support. The record does not reflect a single protective law applicable to the position of trainee agent that affected the availability of women.

105. Defendants' suggestion that women's roles as housewives and mothers accounts for their small representation in State Farm's agency force is also without factual support. Defendants presented no evidence supporting their broad sociological generalizations that homemakers have limited interest in or availability for trainee agent positions in lesser proportions than Professor Pencavel's estimates. Further, defendants' witnesses supported the conclusion that many women with children are interested in and capable of becoming State

Farm agents. (See testimony of Newland, Sullivan, and Frank summarized in Paragraph 41).

106. Defendants' suggestion that lack of preparation for positions in a broad spectrum of occupations accounts for the small number of women in State Farm's agency force is not supported by the record:

a. The testimony is uncontradicted that no preparation is required to become a State Farm trainee agent other than the completion of precontract. With respect to precontract, the evidence is uncontradicted that women do as well as men. (See, e.g., testimony of Raker, Tompkins, and Wehde).

b. The record is uncontradicted that once women are appointed trainee agents they can complete State Farm's training as well as men. (See Testimony of agency managers Duray, Fernandez, and Bush).

107. Defendants' suggestion that the small numbers of women in the State Farm agency force is explained by the "inevitable substantial investments" of personal capital is not supported by record. In fact, the record supports the conclusion that the investment required to become a trainee agent is neither substantial nor inevitable. See paragraph 53.

108. Defendants' suggestion that the large financial risk involved in becoming a trainee agent accounts for the small number of women in the State Farm agency force is not supported by the evidence.

a. There is no support for the conclusion that a large financial risk is involved at all. See paragraphs 43-60.

b. The evidence is uncontradicted that nearly 100% of all trainee agents validate their contracts and earn commissions in excess of the specified monthly payment and that the rate of validation is the same for men and women. See paragraphs 43-52.

c. State Farm's Regional Vice-President Tompkins testified that State Farm has the highest success rate for new agents, the highest retention rates for agents, and the highest earnings of agents in the insurance industry.

d. The record does not support an inference that women are less willing to take a financial risk than men. In fact, women agents who testified were willing to become trainee agents despite poor financial circumstances (e.g., Semler – no money; Newland – living "hand-to-mouth") See paragraph 42.

e. Defendants' conclusions with respect to the impact of an alleged financial risk on women involves broad sociological generalizations for which no evidentiary support has been provided; and

f. Defendants' conclusions with respect to women's unwillingness to commit themselves to a career in trainee agency because they earn less money than men is completely contrary to Professor Pencavel's earnings analysis. See paragraph 83. In fact, it is precisely women who traditionally have earned less money who are likely to be most interested in a relatively high-paying career as a State Farm agent. Conversely, males earning more money in their careers would be less likely to risk a career change.

State Farm Secretaries, Office Managers, and Solicitors Constitute a Relevant Pool of Women for Trainee Agent Positions

109. State Farm agents' secretaries, office managers and solicitors are employees of the agent in whose office they work.

The testimony is uncontradicted that the duties of State Farm secretaries, office managers and solicitors include:

a. Managing the administrative tasks of the agency;

b. Performing secretarial tasks for the agency;

c. Processing claims of policyholders; and,

d. Obtaining expiration dates.

110. In addition, the testimony of defendants' and plaintiffs' witnesses established that State Farm secretaries, office managers and solicitors were familiar with State Farm's multiple lines of insurance and the techniques used to sell them to the public, and that State Farm secretaries, office managers and solicitors often performed precisely the same duties as the agents themselves. The testimony of numerous defense witnesses corroborated this proposition.

a. Regional Vice President Raker testified that State Farm secretaries, office managers, and solicitors were good sources of trainee agent candidates because they were familiar with State Farm products.

b. Agency Manager Edward Casselman stated that experience as a secretary and office manager was valuable to those interested in becoming agents.

c. Agency Manager Vance Basler testified that a particular male office manager learned so much that he was "almost an agent."

d. Agency Manager Robert Carver testified that he appointed Randy Frager as an agent, in part, because he was secretary to his father, and with that experience, he could "handle the agency."

e. Career Agent William Grubbs testified that plaintiff Muriel Kraszewski wrote insurance, called clients for expiration dates, explained coverages, and sold additional lines of insurance to existing clients.

Similarly, Career Agent Larry Konecne testified that after Muriel Kraszewski had been employed by him for one month she frequently ran the agency because of his mother's illness. During this time, her duties included answering phones, handling claims, writing applications, and binding auto and home owners policies.

The testimony of defense witnesses Grubbs and Konecne corroborated Ms. Kraszewski's prior testimony that she could and did perform all the agents' duties.

f. Former career agent Edward Borgia, who employed Daisy Jackson, testified that plaintiff Jackson completely ran his agency for the years 1973 through 1976 while he practiced law full-time. Mr. Borgia admitted that he rarely went to the office and that virtually every sale during this three-year period was attributable to his office manager, plaintiff Jackson. Mr. Borgia testified that because Daisy Jackson was doing all the selling he paid her on a percentage basis.

g. Career Agents William Bremmer and Agency Manager Hicks further corroborated the relevancy of secretarial and managerial work in preparation for becoming a trainee agent. Career Agent Bremmer testified that plaintiff Wilda Tipton ran his office for two months in 1978 while he was on vacation. He confirmed Wilda Tipton's testimony that she solicited the sale of State Farm's multiple lines of insurance. In fact, Mr. Bremmer testified that he paid plaintiff a commission above her salary to solicit sales for him.

Agency Manager Hicks testified that when he gave precontract materials to plaintiff Tipton, he did not need to instruct her about certain fundamentals because of her years of experience as a State Farm secretary and office manager.

h. Career Agent Francis Hanrahan testified that class member Sarah Cline sold all lines of insurance except life insurance while employed by him as a secretary and office manager. In fact, Mr. Hanrahan testified that she ran his office during his vacations and was an "excellent" employee who did "a good job in sales."

i. Career Agent Judy Semler testified that for two years she carried out all the duties of the agent by whom she was employed as a secretary and office manager because of his physical disability. Regional Vice President Raker, familiar with Agent Semler's background, admitted that her experience as an office manager was valuable to her success as a career agent.

j. Career Agent Linda Leaming testified that while employed as a secretary and office manager to Career Agent Ivan Campbell she did expiration dating, handled

walk-in business, sold State Farm's multiple lines of insurance and, in fact, was paid a bonus by Agent Campbell who encouraged her to sell State Farm products. Ms. Leaming testified that while employed as a secretary and office manager, she went into the "field" making calls on escrow companies and realtors to drum-up business. In one year, while employed as a State Farm office manager, she claimed to have sold one-half million dollars in life insurance.

k. Career Agent Ken Sieve, who employed Esther Molina as a secretary and office manager, conceded that Ms. Molina sold over one-half of his auto insurance, answered questions regarding policies, and was familiar with State Farm's coverages and products. He further testified that because he did not speak Spanish, Ms. Molina helped sell and service the Spanish-speaking community, at one point bringing in more than fifty clients.

111. Class member testimony further corroborated the fact that State Farm secretaries, office managers, and solicitors performed virtually all the duties of State Farm trainee and career agents. For example,

a. Class member Sharon Barnes gave uncontradicted testimony that while employed by career agent Richard Laderbrush as an office manager, she did 95% of the selling.

b. Class member Barbara Bryley gave uncontradicted testimony that while employed by State Farm career agent Dick Sandburg she sold all lines of insurance.

c. Class member Dorothy Dillard testified without contradiction that as an office secretary and manager for career agent Claude Anderson she sold virtually all his insurance. In fact, Mr. Anderson rarely came into the office while class member Dillard was running the agency.

d. Class member Mary Lou Hollander testified, again without contradiction, that while working for career agents Boxx and Lundwig, she sold 50% of the insurance for the agency.

e. Class member Stella Lardie testified that after six months as a State Farm secretary, she sold homeowners insurance, auto insurance and easy commercial accounts. A short time thereafter, she began selling life insurance. Ms. Lardie received a commission on life sales and on certain other lines of insurance she sold.

f. Class member Debra McCamish testified that while employed as a office manager for career agent Ted Bowersox she ran the office in his absence (twice exceeding periods of three months) and that as of January 1981 she had a salary arrangement with Mr. Bowersox whereby she received a percentage of the increase in the business on top of her monthly salary.

112. Although the foregoing testimony supports Regional Vice President Don Raker's testimony that secretaries were a good source of State Farm agents because they aided in sales and were familiar with the product, State Farm had no organized program for the recruitment of trainee agents from among agent secretaries, office managers or solicitors.

Women Employed in State Farm's Operations Divisions Constitute a Relevant Pool of Women for Trainee Agent Positions

113. State Farm's operations division provided a large source of available women for recruitment into positions as State Farm trainee agents.

114. No women hired by State Farm in operations or who applied for positions in operations were immediately disqualified for positions as State Farm trainee agents.

115. For the years 1970 through 1981, State Farm hired a total of 12,657 new employees in California. Of these 12,657 new hires, 9,543 (75.4%) were women. However, only 1.0% (95/9543) of the female new hires were trainee agents. By contrast, 40.4% (1258/3114) of the male new hires were trainee agents. Plaintiffs' Exhibits 2-6, 2-7.

116. State Farm often looked to persons with backgrounds in insurance operations in selecting individuals to fill trainee agent positions. For example, during the years 1970 through 1981, 454 of the trainee agents hired by State Farm previously had been employed in insurance operations positions with State Farm or other insurance companies. Plaintiffs' Exhibit 2-10. However, only 46 (10.1%) of these hires from insurance operations positions were women. Plaintiffs' Exhibit 2-10.

117. Regional Vice President Raker conceded that operation employees were a good source of potential female trainee agents because women in operations knew and understood State Farm products. Deputy Regional Vice President Wehde agreed.

118. Trial testimony substantiated the fact that individuals moving from operations to agency performed well as trainee agents, but that virtually all such individuals were male. For example:

a. Defense witness Paul Arritt, a supervisor in underwriting in the Southern California Regional Office, identified four individuals who left the regional office to become successful agents, three were male.

b. Class member Chris Zebratski identified five males who left the Southern California Regional Office to become trainee agents.

c. Larry Konecne and Larry Nazry were identified as current career agents who formerly were employed in operations.

119. Despite the fact that State Farm's agency management cited operations as an excellent source of potential female trainee agents, the record reflects that defendants have discouraged recruitment of trainee agents in operations. For example:

a. Regional Vice President Roger Tompkins testified that defendants made no effort to disseminate information regarding trainee agent positions to operations employees.

b. Agency Manager Warran Buckingham testified that it was frowned upon to recruit agents in operations and that it was "generally understood that it should not be done."

c. In fact, State Farm created several hurdles for any operations employee to transfer to agency. Before an employee could transfer, the employee needed the

approval of his supervisor and division manager. Without this approval, the operations employee could not take the AIB. In addition, there is no evidence that regional office employees knew of the "procedures." No defense witness testified to such a policy's dissemination. In fact, if class members were aware of the transfer procedures, they did not use it for fear of alienating their supervisors. See testimony of class member McCamish.

Defendants' Objections to Operations as a Source of Trainee Agents Are Not Supported by the Record

120. Defendants' proposition that Operations was not a good source of trainee agent prospects ignores the testimony of defendants' management personnel, as well as defendants' own documents regarding sources of trainee agents. See paragraph 87.

121. Further, no facts in the record support plaintiffs' [defendants'] assumptions that women who worked in operations had no interest in trainee agent positions.

122. Defendants reliance on its Management Assessment Register (MAR) to conclude that women in operations were not interested in becoming trainee agents is misplaced. MAR does not serve as an accurate indicator of the interest of women in trainee agent positions because:

a. It was available only to employees classified C-7 and above or to employee in Grade C-1 through C-6 who had obtained an AA degree. Since 90% of all women in operations had positions with Grades C-1 through C-6, the overwhelming percentage of women in operations

was precluded from indicating interest in positions contained in the MAR.

b. The record does not reflect that MAR was uniformly distributed among operations employees, or that operations employees had the opportunity to show their interest. Both Messrs. Dedering and Rosemond testified that they did not know how or to what extent MAR was distributed or made available at the regional offices.

c. Since filling out MAR was "voluntary," there was no guaranty that most women in operations filled it out.

d. Messrs. Rosemond and Dedering both admitted that the number of males allegedly interested in agency as reflected in MAR was inflated because it included numerous duplications. Thus, if an individual indicated a preference in MAR one year, that same expression of interest was counted in each subsequent year despite the fact that it was the same individual expressing the interest.

e. In fact, MAR *did not* indicate an interest in being a trainee agent *per se*. MAR asked whether a particular employee had an interest in agency *or* agency management, without defining the terms. There was no separate category to record an interest in becoming a trainee agent. Defendants' Exhibit 130.

Statistically Significant Disparities Exist When Dr. Pencavel's Sources of Availability Are Compared With State Farm's Trainee Agent New Hires and AIB Test-takers

123. The following statistics highlight the extent of defendants' discriminatory practices herein:

a. Between January 1, 1970 and December 31, 1973 State Farm hired 460 trainee agents, but none were female. Plaintiffs' Exhibit 2-6.

b. In 1974, the year plaintiff Kraszewski pursued a trainee agent position, State Farm hired 126 trainee agents, only one was female. Plaintiffs' Exhibit 2-6.

c. As of December 31, 1977, nearly two years after plaintiff Kraszewski filed her charges of discrimination, State Farm had 5,573 operations employees and agents in California, including 2,607 (46.8%) women. Of the 1,619 agents, only seven (0.4%) were female. Plaintiffs' Exhibits 2-3 and 2-5.

d. Until 1974, State Farm employed only one female sales agent. Plaintiffs' Exhibit 2-3.

e. A great majority of the women (99.9% in 1970; 97.8% in 1981) employed by defendants held lower paying operations jobs while only 46.7% (1978) and 46.6% (1980) of the males held jobs in those categories. Plaintiffs' Exhibits 2-3 and 2-5.

f. Women were 50.7% of the adult population with four years of high school in 1970 and 53.2% in 1979, but only 0.1% and 2.2% of State Farm's agents respectively. Plaintiffs' Exhibits 2-2 and 2-3.

124. Professor Richard Drogin, stipulated by defendants to be an expert in statistics, compared the various estimates of relative female availability testified to by Professor Pencavel with State Farm's trainee agent new hires and AIB test-takers.

125. In this regard, Professor Drogin prepared Plaintiffs' Exhibits 2-14 and 2-16. Plaintiffs' Exhibits 2-6, a

comparison of availability sources and hires of trainee agents, examines the statistical significance of defendants' hiring women compared to their availability in the population and civilian labor force with appropriate refinements for levels of education, age, occupations, and earnings.

126. Plaintiffs' Exhibit 2-14 compares availability sources and AIB test-takers and measures the statistical significance of defendants' recruitment practices (as measured by test-taker flow) when compared to Professor Pencavel's estimates of relative female availability.

127. Professor Drogin concluded that a statistically significant disparity existed between each of Professor Pencavel's availability pools in comparison with either State Farm's new hires or AIB test-takers. The conclusions of Professor Drogin contained in Plaintiffs' Exhibits 2-14 and 2-16 were:

a. A comparison of trainee agent new hires with an external availability pool that includes the 1970 California population ages 19-65 with at least four years of high school (50.7% female) (Pencavel Report, p. 12) for the years 1970-1981 reveals Z-values ranging from -6.47 to -12.25 per year. For all years, the overall Z-value is -32.14 – a significance probability of less than one chance in ten to the 225 power.

b. A comparison of the same availability pool as that in a. above and AIB test-takers for the years 1970 - 1981 reveals Z-values that range from -13.56 to -23.61 per year and a Z-value for all years of -62.27 – a significance probability of less than one chance in ten to the 843 power.

c. A comparison of trainee agent new hires to an external availability pool consisting of the 1979 California population ages 16 and above with at least four years of high school (53.2% female, Pencavel Report, p. 12) for the years 1970-1981 reveals Z-values that range from -7.02 to -12.88 per year. For all years, the overall Z-value is -34.04 – a significance probability of less than one chance in ten to the 252 power.

d. A comparison of the same availability pool in c. above with AIB test-takers for the years 1970-1981 reveals Z-values that range from -14.34 to -24.04 per year, and an overall Z-value for all years of -66.71 – a significance probability of less than one chance in ten to the 967 power.

e. A comparison of trainee agent new hires with an external availability pool that consists of the 1979 California population age 16 and above with at least four years of college (44.4% female, Pencavel Report, p. 12) reflects Z-values that range from -5.14 to -10.0. The overall Z-value for all years is -27.67 – a significance probability of less than one chance in ten to the 167 power.

f. A comparison of the same availability pool as in e. with AIB test-takers reveals Z-values that range from -10.82 to -20.78 for an overall Z-value for all years of -52.73 – a significance probability of less than one chance in ten to the 582 power.

g. A comparison of trainee agent new hires with an external availability pool consisting of the 1970 California labor force age 16 years and above who were employed in Dr. Pencavel's Group II (see paragraph 82c) with at least four years of high school (43.7% female, Pencavel Report,

p. 6) reveals Z-values that range from -5.76 to -10.66. The overall Z-value for all years is -29.75 – a significance probability of less than one chance in ten to the 193 power.

h. A comparison of the same availability pool as in g. above with AIB test-takers reveals Z-values that range from -11.84 to -22.09 and an overall Z-value of -56.66 – a significance probability of less than one chance in ten to the 698 power.

i. A comparison of trainee agent new hires with an external availability pool consisting of the 1970 labor force age 16 years and above employed in Dr. Pencavel's Group I (see paragraph 84c) with at least four years of college (29.0% female, Pencavel Report, p. 6) reveals Z-values as high as -7.72 and an overall Z-value of -17.82 – a significance probability of less than one chance in ten to the 69 power.

j. A comparison of the same availability pool as that in i. above with AIB test-takers reveals Z-values as high as -14.76 and an overall Z-value of -27.39 – a significance probability of less than one chance in ten to the 163 power.

k. A comparison of trainee agent new hires with an external availability pool consisting of the 1970 California labor force age 19-65 who are employed with at least four years of college (23.7% female, Pencavel Report, p. 12) reveals Z-values that range per year from -2.34 to -7.28. The overall Z-value for all years is -18.88 – a significance probability of less than one chance in ten to the 78 power.

l. A comparison of the same availability pool as in k. above with AIB test-takers reveals Z-values that range

per year from -2.14 to -15.39 and an overall Z-value of 30.13 – a significance probability of less than one chance in ten to the 198 power.

m. A comparison of trainee agent new hires with an external availability pool consisting of the 1979 California labor force age 16 years and over, who are employed with at least four years of college (36.0% female, Pencavel Report, p. 12), reveals Z-values that range per year from -3.44 to -9.06. The overall Z-value for all years is -22.21 – a significance probability of less than one chance in ten to the 108 power.

n. A comparison of the same availability pool as in m. above with AIB test-takers reveals Z-values that range from -5.59 to -17.39 per year and an overall Z-value of -38.47 – a significance probability of less than one chance in ten to the 322 power.

o. A comparison of trainee agent new hires with an external availability pool consisting of the 1979 California white collar labor force who was employed (52.1% female, Pencavel Report, p. 12) reveals Z-values that range per year from -6.77 to -12.60. The overall Z-value for all years is -33.19 – a significance probability of less than one chance in ten to the 240 power.

p. A comparison of the same external availability pool in o. above with AIB test-takers reveals Z-values ranging per year from -14.03 to -24.29 and an overall Z-value of -64.74 – a significance probability of less than one chance in ten to the 911 power.

q. A comparison of trainee agent new hires to the external availability pool consisting of Dr. Pencavel's low

estimate of women available for trainee agent positions in California (35.0%, See paragraphs 82 through 86, Pencavel Report, p. 19) reveals Z-values that range per year from -3.23 to -8.87. The overall Z-values for all years is -21.58 – a significance probability of less than one chance in nineteen to the 102 power.

r. A comparison of Dr. Pencavel's low estimate availability (35.0%, q. above) with AIB test-takers reveals Z-scores that range per year from -4.69 to -17.00 (1972) and an overall Z-value of -36.90 – a significance probability of less than one chance in ten to the 296 power.

s. A comparison of trainee agent new hires to an external availability pool consisting of Dr. Pencavel's high estimate of women available for the position of trainee agent in California (45.0% Pencavel Report, p. 19) reveals Z-values that range per year from -5.26 to -10.93. The overall Z-value is -28.08 – a significance probability of less than one chance in ten to the 172 power.

t. A comparison of Dr. Pencavel's high estimate availability (45.0%, s. above) with AIB test-takers reveals Z-values that range per year from -10.61 to -21.03 and an overall Z-value of -52.71 – a significance probability of less than one chance in ten to the 604 power.

The Factual Basis Underlying the Underrepresentation of Women as State Farm Career Sales Agents and State Farm Trainee Agents

128. The underrepresentation of women in State Farm agent positions, despite large numbers of qualified available women, is explained by the following factors:

a. State Farm's failure to recruit women in the agency workforce by failing to post job notices and to advertise trainee agent openings, and reliance on word-of-mouth recruitment by a nearly all male sales and managerial workforce;

b. State Farm's deterrence of women from participation in the agency force by perpetuating an all male image in the advertisement of its products and recruitment of trainee agents;

c. State Farm's discouragement of women from seeking sales positions;

d. State Farm's application of subjective criteria that exclude women from sales positions; and,

e. Nepotism in the employment of trainee agents that favors male relatives of incumbent members of State Farm's sales force.

State Farm's Recruiting Policies Exclude Women

129. The State Farm Insurance Companies decided if and when to recruit trainee agents. This determination was made by analyzing market needs and the size of the agency workforce.

130. State Farm's all male agency management force, including its regional vice presidents, deputy regional vice presidents, and agency directors decided whether or not to recruit.

131. Once a decision to recruit trainee agents was made, State Farm's agency managers had primary responsibility for recruitment. In carrying out their

recruiting responsibilities, agency managers worked with, and were ultimately responsible to, State Farm Agency directors, regional vice presidents, deputy regional vice presidents, and agency directors.

132. State Farm issued no written policies, standards or guidelines to agency managers, agency directors, deputy regional vice presidents and regional vice presidents regarding the recruitment of trainee agents.

133. Although the topic of recruitment was discussed at agency manager school, the manner in which recruitment was carried out was left to the discretion of the particular agency manager, male agency director, male deputy regional vice president, and/or male regional vice president.

134. The actual recruitment practices of State Farm's agency managers consisted almost entirely of word-of-mouth recruitment by an all male managerial staff. Regional Vice President Raker described State Farm's efforts to recruit trainee agents as a "talking network" in which agency managers "dig up" candidates by "go[ing] out and talk[ing] to people."

135. The manner in which State Farm's all male "talking network" operated was described in the Agency Manager Pre-Contract Guide and Text (Plaintiffs' Exhibit 31) which instructed agency managers to recruit trainee agent candidates through:

a. Use of a personal contact method that consisted of agency managers seeking recruits through personal friends; friends in community and social groups; former business associates; and people with whom the agency

manager does business. Plaintiffs' Exhibit 31 at Chap. 3, p. 5.

b. Use of centers of influence that consisted of agency managers developing contacts with persons of "reputable and important standing in the community." The center of influence served as the primary source of referrals for trainee agent candidates has been from State Farm's viewpoint, "by far the most effective single method of recruiting." (Plaintiffs' Exhibit 31, Chap. 3 at p. 6)

136. State Farm's agency management witnesses described the actual manner in which these methods of recruitment operated. For example:

a. The testimony of 32-year incumbent State Farm Agency Manager Warren Buckingham typifies the manner in which agency managers recruited. Agency Manager Buckingham testified that he had primary responsibility for recruiting his agents and did so by:

(1) talking to agents, friends, and business associates;

(2) Relying on centers of influence; and

(3) Making personal observations.

Agency Manager Buckingham testified that in 32 years he never had a female center of influence or a female referral from any of his centers of influence. In 32 years, Agency Manager Buckingham never hired a woman.

Agency Manager Buckingham also explained his method of recruitment by personal observation. He testified that sometimes he personally observed the qualities

requisite to a successful trainee agent in people he met. As an example, he explained that he recruited and hired his gas station attendant to be a trainee agent.

b. The testimony of Agency Manager Gerald A. Estabrook established that while new agency managers may be younger, their methods of recruitment remained the same. Mr. Estabrook testified that he relied primarily upon all male centers of influence.

Agency Manager Estabrook explained the operation of State Farm's word-of-mouth recruitment process by describing the manner in which he was recruited to become a trainee agent and the manner in which he presently recruits trainee agents. With respect to the former, he testified that he was recruited by Skip Crank, a male State Farm agent and handball partner, who referred him to Agency Manager Joe Fernandez. Agency Manager Estabrook related that Mr. Crank consistently encouraged him to take advantage of the opportunity because of the income he could potentially earn.

As Agency Manager, Mr. Estabrook used similar recruiting techniques. He testified that he appointed males that he knew and recruited through his membership in the all male Newport Beach Athletic Club. His active recruitment of trainee agent candidates often occurred in the showers after a hard game of racquet ball.

c. Deputy Regional Vice President Wehde confirmed that agency managers recruited primarily through centers of influence ("business and social clubs"); personal contact; and personal observation.

d. Regional Vice President Raker described his best contacts for locating trainee agent recruits as social acquaintances, people at the bank, dinner club friends, bank managers and the presidents of the Chamber of Commerce and Kiwanis Club.

137. By defendants' own admission, their word-of-mouth method of recruitment has restricted the number of female recruits. For example:

a. On February 10, 1978, Don Frischmann, Vice President Agency in the Manpower Development Division promulgated the document "Training the Trainer Topics." Plaintiffs' Exhibit 28. The document directly admitted the impact of word-of-mouth recruitment by an all male agency management force on the number of female trainee agent recruits. The document states:

Agency managers face some real challenges in recruiting female agents.

1. Most managers gain their experience in what was virtually an all-male business environment.

2. *The great majority of State Farm agents appointed over the years have been male, and so it is entirely logical that most managers would continue to look upon males as their primary source of recruits.*

3. But women, too, are now interested in the tremendous career opportunity we have to offer.

    a. Many of these women have the ability and desire to succeed in our business.

    b. And State Farm is committed to bringing more women into our company as agents.

4. All of these factors would leave the average agency manager with a dilemna – i.e., how to go about intelligently evaluating female recruits. Training the Trainer Topics at p. 3. (Emphasis added.)

b. The impact of State Farm's recruitment and selection procedures on female applicant flow is also implicitly acknowledge [sic] by defendants in their "Agency Manager Precontract Guide and Text." (Plaintiffs' Exhibit 31) In Chapter Two entitled "Candidate Identification," the manual asked and answered the question of what constituted a qualified prospect and confirmed the inevitability of obtaining male recruits because of State Farm's recruiting practices.

Before you will be able to get the names of qualified prospects, you will have to have in your own mind a picture of the kind of person that you want. Where will that picture come from? Since you are beginning your career as a recruiter, you will have to rely on the successful experience of people who have gone before you. After many months of experience, you will compose your own picture of the type of person you want. *Chances are it will differ very little from the picture that has been used successfully by countless other agency managers.* [Emphasis added] Chapter Two, p. 1.

c. Deputy Regional Vice President Wehde also admitted State Farm's recruiting failures with respect to women. He testified that "the results are not as good as they could be" because State Farm had not done an adequate job of "selling the career opportunity to women." He concluded that there "are more women out there."

138. In spite of these failures, the use of a word-of-mouth network combined with personal observation was

essentially the only means of recruitment used by agency managers.

139. State Farm did not advertise in any print or electronics media for trainee agents. Regional Vice President Roger Tompkins testified that State Farm had no need to advertise for trainee agents. Deputy Regional Vice President Wehde emphasized that it was corporate policy not to advertise because it attracted "the wrong candidates." Despite his assertions with respect to "wrong candidates," Deputy Regional Vice President Wehde conceded that he had not had any personal experience with advertising for nearly 20 years.

140. State Farm did not use employment agencies in any form to recruit trainee agents.

141. State Farm did not recruit on college campuses for trainee agent candidates.

142. Although State Farm management agency personnel acknowledged that operations is a valuable source of trainee agents (paragraphs 113 through 122), State Farm made little, if any, effort to recruit women from its many female employees in operations. Agency Manager Buckingham testified that recruiting trainee agents from operations was "frowned upon" by State Farm.

143. Although State Farm management agency personnel acknowledged that State Farm secretaries, office managers and solicitors were an excellent source of trainee agent candidates (paragraphs 109 through 112), State Farm did not recruit trainee agents from their agents' employees.

144. State Farm did not post notices of available trainee agent positions in any of its regional offices, claims offices, or agency offices.

145. State Farm was familiar with modern recruiting practices, as evidenced by its method of recruiting employees for operations positions which differed completely from its practices in agency.

146. John Peterson, Personnel Specialist, and William Newlin, Regional Personnel Manager, described State Farm's modern recruiting practices for operations and the reasons for their success. For example:

a. State Farm posted all openings for operations positions in conspicuous places because:

(1) Posting permitted employees to know of open positions and opportunity for advancement;

(2) Posting provided specific information on operations positions and maximized interest;

(3) Posting permitted State Farm to be aware of its human resources;

(4) Posting told people how to apply for a position;

(5) Posting gave people the opportunity to apply for positions; and,

(6) Posting helped State Farm retain good employees.

Messrs. Peterson and Newlin both testified that State Farm's posting system worked effectively. Each testified that they had no reason to believe that job posting would not be equally effective for trainee agent positions. Each

did not know why trainee agent positions were not posted.

b. State Farm recruited for operations positions on college campuses because:

(1) It made people aware of State Farm's opportunities in operations;

(2) It helped locate the most qualified candidates; and,

(3) It ensured that people knew of the opportunities at State Farm.

John Peterson was unaware of any reason why college campus recruiting was not used for trainee agents and saw no reason why it would not be equally effective.

c. State Farm advertised for operations positions.

147. State Farm failed to use these modern, effective personnel practices in its agency division. Instead, it relied on the "talking network" of virtually all male managers to recruit trainee agents, restricting information regarding trainee agent opening primarily to males. Thus, State Farm limited the access of women to knowledge of available trainee agent openings and the opportunity to apply and compete.

State Farm Presented An All Male Image To The Public

148. Until 1979, the recruitment brochures produced by State Farm to explain and recruit for trainee agents conveyed the impression that State Farm agents were all male and that only males need apply. For example:

a. Plaintiffs Exhibit 8-5.1, a card used to explain the trainee agent position entitled "Our Agency Force" constituted State Farm's only effort to recruit trainee agent candidates in its regional offices. It was a small card maintained in the reception area of each regional office. From 1970 through 1979, the card referred to agents in the male gender and stated that the agent "must also serve as 'the friendly guy' who lives nearby." (emphasis added.)

b. Prior to 1979, a recruiting brochure for the general public entitled "What's Your Job Worth . . . Half Your Life" (Plaintiffs' Exhibit 8-7) contained 31 pictures of agents, all of whom were male. The clear impression conveyed by the brochure was that it was desirable to become a State Farm agent, but that all State Farm agents were male.

c. Defendants' Exhibit 176.1, a recruiting brochure for all positions with the State Farm Insurance Companies and entitled "Spectrum of Opportunities" contained a single page describing a career in agency. The agent pictured was male.

d. Through 1979, the career presentation widely used by agency managers to recruit trainee agents (Plaintiffs' Exhibit 8-10) contained 30 pictures of agents, all of whom were male.

149. In fact, prior to 1979, not a single woman was portrayed in any State Farm brochure recruiting individuals for the sales force.

150. In 1979, State Farm acknowledged the impact that its recruiting brochures had on the sexual composition of its sales force and ordered two recruitment

brochures discontinued (Plaintiffs' Exhibits 8-6 and 8-7) and the Career Presentation revised, in part, because of the predominantly all male image conveyed by each. In a memorandum to regional vice presidents ordering the changes, State Farm noted that the revised Career Presentation "incorporat[ed] pictures of females and minorities, appropriate in today's environment." Plaintiffs' Exhibit 8-11.

151. Deputy Regional Vice President Wehde acknowledged that inclusion of women in recruiting brochures such as the Career Presentation would help bring women into the sales force.

152. State Farm's advertisement of its insurance product, through the Good Neighbor theme on television, radio, and in the print media, similarly portrayed the position of State Farm sales agent as a male position intended to be filled by males. For example:

a. Plaintiffs' Exhibit 4-13 is a composite representative sample of defendants' television advertisements for the years 1970 through 1981. Not a single female agent was protrayed [sic] in any of the advertisements prior to 1979.

b. Plaintiffs' Exhibits 4-1 through 4-12, a large representative sample of defendants' print advertisements for the years 1970 through 1981, portrayed a sales force that is virtually all male. Not a single female appeared in any of these advertisements until 1977.

153. State Farm's all male image affected women interested in becoming trainee agents. For example:

a. Plaintiff Muriel Kraszewski testified that the State Farm television ads with which she was familiar portrayed an all male image; and

b. Class member Debra McCamish testified that because she saw all males in advertisements, her feelings were confirmed that the trainee agent position was for men and not women.

154. In sum, the image portrayed by State Farm in its advertisements and recruiting brochures depicted stereotypic images of passive females who cared for the family while their husbands earned a living.

155. This all male image deterred and discouraged women from applying for the position of trainee agent, and thus contributed to their under representation in State Farm's sales force.

State Farm Has The Reputation of Not Hiring Women as Trainee Agents

156. State Farm had a reputation for not hiring female trainee agents – a view held by women who work in State Farm's operations division and as State Farm solicitors, secretaries, or office managers, and by women seeking employment with State Farm.

157. The impact of State Farm's reputation was inextricably intertwined with State Farm's all male image. Regional Vice President Roger Tompkins testified that State Farm agents were "walking billboards" for the position. He stated that employees observed the agents and then decided whether to take the initiative to apply.

158. The testimony of plaintiffs and class members confirmed the impact that State Farm's virtually all male agency force has had on the company's image and its reputation with respect to hiring women. In each case, women believed that because of their own observations and comments by State Farm's management employees, the company had a reputation for only hiring male trainee agents and desired to keep it that way. For example:

a. Former regional office employees and secretaries to State Farm agents Debra McCamish and Chris Zebratski each testified that they only observed male employees transferring from the regional office to agency and that they believed only males were permitted to transfer.

b. Former State Farm secretary and class member Sharon Barnes testified that she thought State Farm would not hire women; that she talked to agency managers about State Farm's reputation; and that they confirmed her belief that State Farm did not hire women agents. Her feelings with respect to State Farm's reputation were further confirmed because she only saw male agents.

c. Plaintiff Muriel Kraszewski testified that she understood State Farm to have a reputation of not hiring women agents. She testified that her knowledge of State Farm's reputation was based upon conversations with Agency Manager Carver and Agency Director Miller who told her State Farm did not hire women agents. Her feelings with respect to State Farm's reputation for not hiring women were confirmed by the fact that she never

saw women agents. Plaintiff Kraszewski discussed State Farm's reputation with other State Farm secretaries and office managers including class member Sarah Cline.

d. Dorothy Dillard, an employee of State Farm agents and agency managers for the past 28 years, testified that she knew that State Farm had a reputation for not hiring women. Her knowledge of this reputation was based upon conversations with Agency Manager Don Wilson who told her that he would not hire women. Her feelings regarding State Farm's reputation were confirmed because she never saw a women hired by Agency Manager Wilson in all the years she worked for him.

159. The perpetuation of the predominantly all male sales force reinforced State Farm's reputation for not hiring female agents in the eyes of female secretaries and office managers to State Farm agents, women who work in operations, and women outside the company.

160. The reputation of State Farm with respect to hiring women for sales agent positions has discouraged women from applying for positions as trainee agents.

161. State Farm's reputation with respect to hiring women for the positions as trainee agents has distorted and depressed the applicant flow rate of women for trainee agent positions and ensure their under-representation in State Farm's sales force.

State Farm Actively Discouraged Women From Applying To Be Trainee.

162. State Farm's reputation with respect to hiring women for the position of trainee agent also has

developed because of the manner in which State Farm actively discouraged women from seeking and attaining positions as trainee agents. This active discouragement of women is illustrated by the following examples:

a. State Farm's secretaries and office mangers familiar with agency work, who often performed the agents' sales tasks have been ignored, lied to, and/or give false and misleading information when they have inquired about the possibility of becoming trainee agents. Women have been told about educational requirements that did not exist, financial requirements not founded in fact, and false information with respect to availability of positions.

b. It was made clear to many women that the hiring of a female trainee agent was a rare occurrence and their prospects of hire as trainee agents were not good.

c. Women interested in becoming State Farm trainee agents were told by State Farm that the trainee agent position was too dangerous and not suitable for women.

d. State Farm's secretaries and office managers interested in becoming trainee agents were often told that State Farm career sales agents, agency managers and/or agency directors did not hire women trainee agents.

e. Secretaries and office managers to State Farm career sales agents were told that they were too valuable to the company as secretaries and office managers and that they should not seek advancement to the position of trainee agent. In this regard, women were told that they should think first of the agents for whom they work and consider how lucky they were to be a part of a successful agency.

f. Women who applied for positions at State Farm regional offices were misinformed that women must begin in clerical positions and "work their way up" to the position of trainee agent.

g. Many women applying at the regional offices who directly expressed an interest in marketing or sales were not informed of the nature of the trainee agent position and/or the availability of such a position.

163. The trial record corroborates these conclusions that women employed as State Farm secretaries, office managers, or solicitors were actively discouraged from becoming trainee agents. The following former and current State Farm secretaries, office managers, and solicitors testified to the active discouragement to which they were subjected in their efforts to become trainee agents.

a. Plaintiff Muriel Kraszewski spoke with at least eight individuals about becoming a trainee agent. Despite her extensive experience as a secretary and office manager in which she performed most, if not all, of the duties of her agent employer (see paragraphs 225-47) she was discouraged by most of the individuals with whom she spoke. For example:

(1) Agent Larry Konecné told her in 1974 that State Farm did not hire women agents and laughed when she expressed her interest.

(2) Agency Managers Robert Carver, Lou Matz and Manny Pirrone told her that they could not hire plaintiff Kraszewski because they had "no files" to give her. In fact, there was no such requirement to become a trainee agent.

(3) Agency Manager Matt Madsen told plaintiff Kraszewski that becoming an agent required long hours, work every night, time away from the family, and that it would be difficult for State Farm to protect women agents.

(4) Finally, Agency Manager Eugene Miller told plaintiff Kraszewski in March 1975 that he could not hire her because she had no college degree, which he maintained was required by an alleged State Farm rule change in December 1974. In fact no such requirement existed. See paragraphs 221 through 243.

b. Plaintiff Daisy Jackson, who ran Ed Borgia's State Farm agency while he practiced law full time, was discouraged in the following manner:

(1) She was informed by Agency Manager Don Wilson as early as 1973 that "State Farm did not hire women agents."

(2) Plaintiff Jackson testified and Agency Manager Wilson conceded that he told plaintiff Jackson that State Farm was looking for family men with college degrees.

(3) Plaintiff Jackson testified and Agency Manager Wilson conceded that he told plaintiff Jackson that he preferred married men with nonworking wives and that he often attempted to persuade the wives of agents to become secretaries or office managers for their husbands.

(4) Plaintiff Jackson testified and Agency Manager Wilson conceded that he told plaintiff Jackson that he did not encourage plaintiff Jackson to become an agent because he felt that the Borgia agency was a good opportunity for her and that he did not want agent Borgia to

lose a good office manager. Agency Manager Wilson testified that he consistently told other State Farm agent secretaries, such as Claudia Haynes, that they should remain secretaries rather than seek the position of trainee agent.

(5) During the period April 1973 through June 1974, the time frame when plaintiff Jackson expressed an interest in agency, Agency Manager Wilson had an opening. Agency Manager Wilson, however, appointed his son Roger to the position. At the time of Roger Wilson's appointment, Roger was not living in California and had to be persuaded to apply and return to California by his father. Plaintiffs' Exhibit 63-65.

(6) Plaintiff Daisy Jackson expressed an interest in becoming a trainee agent in 1975 to her agent Ed Borgia. At that time, agent Borgia told her that women made neither good sales agents nor lawyers.

(7) But for the active discouragement by her agent and agency manager, Daisy Jackson would have been a State Farm trainee agent as early as 1973 rather than February 1976, when she was finally given a trainee agent position. See paragraphs 244-76.

c. Class member Dorothy Dillard, long-time agency secretary and office manager, (see paragraph 114) was discouraged as follows:

(1) She testified that Don Wilson told her in 1964 that he would not hire a women [sic]; that he had had back luck with women in the past; and, that she could speak to another agency manager, but he doubted it would do any good.

(2) In 1974 or 1975, upon the death of Agent George Seifert, Agency Manager Wilson told class member Dillard that he would not consider her because "I don't hire women and, in any case, being an agent is too difficult for women because of the long hours and night work." Agency Manager Wilson told her that being an agent was better suited for men and that women made better secretaries.

(3) Agency Manager Wilson told class member Dillard, as he had told plaintiff Daisy Jackson, that he could not take a good secretary away from an agent.

(4) Class member Dillard was never offered the Aptitude Index Battery Test and was never put into a selection pool.

d. Class member Sarah Cline, agent secretary and office manager (see paragraphs 113 through 114), spoke with at least six individuals about becom[ing] a trainee agent and, in each case, was actively discouraged, lied to, and misinformed about the qualifications for and availability of trainee agent positions. The active discouragement of class member Cline included the following:

(1) When Cline first expressed an interest in becoming a trainee agent, Agency Director Eugene Miller told her that there was an "unwritten law in the region" that State Farm would not hire a female because of a fear that women would be raped and that women would not want the responsibilities or duties. Agency Director Miller also told class member Cline that she had to be married and needed a college degree. When Sarah Cline said, "I am married," he said, "O.K., then you have to be single."

(2) Class member Cline next spoke to Agency Manager Robert Carver, who told her he had no openings.

(3) Because class member Cline knew plaintiff Kraszewski and also knew that plaintiff Kraszewski was dealing with Agency Manager Madsen, Ms. Cline expressed an interest to Agency Manager Madsen regarding trainee agency. Class member Cline asked Agency Manager Madsen if State Farm could hire a woman, and he said, "I think I can get it through." He also stated, however, that she had to have a college degree.

(4) Because Agency Manager Madsen indicated the need for a college degree, Sarah Cline completed 47 units and her degree in one year. She immediately informed Agency Manager Madsen who referred her to Agency Managers William Gabbard and Ed Castleman.

(5) In September or October 1975, Sarah Cline met with Agency Manager Gabbard, who told her he had no openings. In fact, he had no openings because he committed himself to the appointment of two males, Ron Greek and Stan Jones. He had solicited and recruited them prior to his becoming an agency manager without considering other individuals. In 1976, Agency Manager Gabbard appointed two additional males, and despite the fact he considered Cline a "strong" candidate, he never informed her of or considered her for these additional positions.

(6) Agency Manager Gabbard testified that he asked class member Cline whether she planned to have children so that she could "realize the impact of trainee agency on her domestic situation."

(7) Thereafter, class member Cline went to see Agency Manager Casselman who at first gave her pre-contract study materials, but then called and said there were "no longer any openings" and that "there had been a freeze by the company." Class member Cline testified that she was "shocked" and "crushed."

(8) Thereafter, class member Cline went to see Agency Manager Ersel Smith, who told her there would be no openings for one or two years. Agency Manager Smith testified that he considered Cline a "long term prospect," yet he failed to inform her of or consider her for an opening filled by William Barvin in February, 1977. Despite contacting six agency managers and directors and her strong qualifications as a prospective agent, Sarah Cline was never put into a selection pool and allowed to compete for a trainee agent position.

(9) She is now a successful sales agent for Farmer's Insurance Group.

e. Class member Debra McCamish, former regional office employee and former secretary to various State Farm agents (see paragraph 111), testified that although she expressed an interest in agency during the time she was in the regional office as well as during the time she was employed by State Farm agents, she was never encouraged to become a trainee agent and was often actively discouraged.

(1) While in the regional office, class member McCamish asked Career Agent Gary Orgill and regional office employee Paul Arritt what was required to become a trainee agent. Neither of them explained the process to

her or referred her to an agency manager or agency director.

(2) Class member McCamish testified that while employed by Career Agent Gary Baker, she expressed an interest in agency but was told it required a Bachelor of Arts degree and a "large financial commitment." She was never told about the AIB or given an opportunity to take it.

(3) While employed by Agent Ted Bowersox, class member McCamish expressed her interest in agency. Agent Bowersox put her in contact with Agency Manager Paul Bush, who told her that becoming an agent would require an investment of $30,000 and that a college degree was preferred. She was never told about the AIB or given any forms to fill out by Agency Manager Bush.

(4) Agency Manager Bush told her that it was difficult for women to become agents.

(5) Agency Manager Bush testified that he did "nothing" to encourage class member McCamish to become an agent; that he never offered her an opportunity to take the AIB; that he never explained to her that agency was "a good opportunity," and that he did nothing to "sell" her on becoming a trainee agent.

(6) At the time class member McCamish expressed an interest in agency to Agency Managers Bush and Bowersox, an opening was filled by a male, Richard Cook. She was never permitted to compete for that position. Richard Cook was ultimately terminated for unsatisfactory performance.

(7) Class member McCamish was never permitted to take the AIB, enter a selection pool, or become a trainee agent. She is now a successful sales agent with Farmers Insurance Group.

f. Class member Esther Molina, secretary to State Farm Agent Ken Sieve (see paragraph 110) testified to the manner in which Agent Sieve discouraged her from becoming an agent:

(1) Agent Sieve told her it was difficult for women to become agents because business people did not respond to women as they do to men.

(2) Agent Sieve told her that she had to have a college degree and make a substantial financial investment.

(3) Agent Sieve never told her about financial support from the company such as a specified monthly payment or any other possible support.

(4) Agent Sieve told her that the job involved long hours, much time away from the family, and that she would have to go back East to train for six weeks.

(5) Class member Molina testified that Agent Sieve never explained the procedure to become an agent, never offered her the AIB, and never offered her any encouragement.

(6) Class member Molina testified that she also expressed an interest in agency to Agency Director Dufresne and that he told her that she did not have enough experience and that she was not qualified.

(7) Esther Molina was never given the opportunity to take the AIB, was never put into a selection pool, nor hired as a trainee agent.

g. Class member Chris Zebratski was employed at the Southern California Regional Office for nine years. During that time, she advanced from the position of clerk to personal lines underwriter. During this period, she also worked with numerous agents. Because of her contact with agents while at the regional office, she became interested in becoming an agent. She testified to the following discouragement:

(1) Class member Zebratski testified that she spoke with Agency Manager Muril Clift, with whom she had contact at the regional office. He referred her to Agency Director Del Eisenbraun. Agency Director Eisenbraun told class member Zebratski that she needed $5,000 in the bank; that he was concerned with her lack of a college degree; and that he was concerned that she was to attractive which might cause problems with commercial clients and the wives of his incumbent agents.

(2) While class member Zebratski was employed at the regional office and being discouraged from pursuing agency, she saw five male employees – Mike Karris, Terry Knorr, Greg Magedman, John Johnson, and Bob Simmons – transfer from the regional office to agency.

(3) Class member Zebratski eventually left Southern California but did not apply for agency in Northern California because of her rejection in Southern California.

(4) Class member Zebratski was never offered an opportunity to take the AIB, was never put into a selection pool, and was not hired as a trainee agent. She is now a successful sales agent with St. Paul Fire & Marine Insurance Company.

h. Class member Barbara Bryley, an agency secretary and office manager to Agent Sandberg from 1979 to 1982 (paragraph 111) was actively discouraged from becoming a trainee agent in the following manner:

(1) Class member Bryley testified that Agency Manager Robert Carver told her that State Farm did not hire females and that to become a trainee agent either a college degree or five years work experience was necessary. He also told her that she would need $20,000 to $25,000 to become a trainee agent.

(2) Agency Manager Carver never gave her the AIB nor did anything else to explain how to become a trainee agent.

(3) During his trial testimony, Agency Manager Carver conceded that class member Bryley's Agent, Dick Sandberg, threatened to sue "everyone in sight" if class member Bryley was appointed as an agent.

(4) Despite Agency Manager Carver's failure to encourage class member Bryley, he did appoint Randy Frager. The appointment of Frager was made under the following circumstances:

(a) Frager was the son of an incumbent State Farm agent;

(b) Frager was given the AIB, failed it and permitted to take it a second time;

(c) Frager was helped because, in Carver's own words, he was "the son of a good agent";

(d) Agency Manager Carver referred Randy Frager to two different agency managers, one of whom did not have an opening and another who was in an area that Randy Frager did not want;

(e) To accommodate Frager, a special position was created for him;

(f) There was no selection pool for the appointment of Randy Frager;

(g) He thought Randy Frager would be a good agent because he was a former secretary in his father's agency.

(5) Class member Bryley was never given an opportunity to take the AIB, was not put into any selection pool, and was not hired as a trainee agent. She is now a successful agent for Farmer's Insurance Group.

i. Class member Mary Lou Hollander, while employed by Career Agents Harold Boxx and Robert Ludwig (See paragraph 111) was told by Agent Ludwig that "you do everything I do." Nonetheless, class member Hollander experienced the following discouragement in attempting to become a trainee agent.

(1) Class member Hollander testified that Agent Ludwig did not take the prospect of class member Hollander becoming an agent serious because:

(a) He knew that State Farm had no women agents; and

(b) He believed a female application to then Agency Manager Manny Pirrone would be a waste of time.

(2) Class member Hollander testified that she spoke with Agency Manager Casselman because she knew of an opening in Mission Viejo in the summer of 1976. Casselman told her that seeking a trainee agent position as a woman would be "swimming against the current"; that State Farm had a policy not to hire women; and that she would not be considered without a college degree. At trial, Agency Manager Casselman did not deny the conversation, but merely stated that he could not recall speaking with class member Hollander.

(3) Class member Hollander was never permitted to take the AIB or placed in a selection pool.

j. Class member Sharon Barnes testified that she worked for Career Agent Richard Ladderbrush from 1968 through 1979. See paragraph 111. She testified that as early as 1974, she was interested in becoming a career agent but met the following resistance:

(1) In 1974, she contacted Agency Manager McCarthy, who told her that State Farm did not hire women agents and that if she took the AIB she should not use the name Sharon and suggested that she use the name "Sam" or "Seymour." When class members [sic] Barnes did take the AIB, she used the name "S. McGee" to hide her sex.

(2) Class member Barnes testified that in 1978 she was told by Vance Basler that she could not become a trainee agent without a college degree; that an investment of $10,000 to $20,000 was required; and that the trainee

agent position was not suitable for women because it was not appropriate for women to knock on doors.

k. Class member Stella Lardie, secretary and office manager between the years 1977 and 1981 (see paragraph 111), testified that within six months of her employment as a secretary to career agent Red Coffman, she expressed her interest in becoming an agent. She was actively discouraged as follows:

(1) Agent Coffman never told her about the AIB or gave her any forms to fill out. Rather, he told her that she would need a college degree and substantial backing of between $15,000 and $20,000.

(2) Class member Lardie spoke with agency manager Art Kocherhans about becoming an agent. He did not inform her about the AIB nor did he refer to any other agency manager or say anything about the qualifications to become a trainee agent.

(3) Class member Lardie testified that Agency Manager Denny Duray did not take her direct expression of interest seriously, did nothing to encourage her, and did nothing to explain how to become a trainee agent.

(4) Class member Lardie testified that during Christmas 1980, she asked Agency Manager Dick Curtis what she should do to become an agent and about the possibility of filling the vacancy soon to be created by the retirement of Agent Coffman. Agency Manager Curtis responded that she would need a college degree, that she was not qualified, and that she was not serious enough. She testified that Agency Manager Curtis did nothing to explain how to become a trainee agent.

(5) Class member Lardie testified that she never spoke to an agency manager again, never became a trainee agent, and is now a successful agent with Farmers Insurance Group. Lardie was never given an opportunity to take the AIB and was not placed in any selection pool.

164. In addition to the active discouragement of State Farm secretaries, office managers, solicitors and regional office employees from becoming trainee agents, women not employed by State Farm who applied or expressed an interest in trainee agency at the regional office were also actively discouraged, lied to, and misinformed about the nature and availability of trainee agent positions. The trial record is replete with examples of facially qualified women who were not permitted to pursue a career in trainee agency.

165. Despite claims of personnel employees at State Farm's regional offices, such as John Peterson and Larry Nazry, that applications or resumes expressing an interest in sales were automatically forwarded to agency managers or agency directors, the experiences of class members indicated that such a practice was rarely, if ever, carried out.

166. Similarly, despite State Farm's claims, as expressed by Messrs. Peterson and Nazry, that an applicant expressing an interest in sales during a regional office interview was automatically referred to an agency manager or agency director, the record reflects that such referrals were rarely made. For example:

a. Class member Linda Isler filled out an application to become a claims adjuster at the Rohnert Park Regional Office in 1980. After submitting her application,

she phoned and expressed an interest in sales. She was asked if she had children; she was told that State Farm was not hiring agents; she was told that the trainee agent position required long hours and strenuous work; she was not given an AIB or any forms to fill out or referred to an agency manager or director; and she was never encouraged or told the positive things about a career in agency. She concluded that she felt "brushed off."

b. Class member Karlene Taylor, in December 1979 or January 1980, applied to the Southern California Regional Office for a position in "sales." She testified that John Peterson discouraged her by only pointing out financial problems, never indicating the possibility of an SMP, never discussing the possibility of training, never offering her the AIB, and never referring her to an agency manager or agency director.

c. Class member Judith Napier testified that in the spring of 1978, she went to the Southern California Regional Office looking for a position in marketing or sales. She testified that after expressing an interest in sales, she was told that State Farm was only looking for "newly graduated law students." She further testified that she was never given the AIB or any forms to fill out and that she was never referred to any State Farm agency management employee. She testified that she felt discouraged and that she believed that State Farm was not hiring women in sales positions.

d. Class member Andrea Pardue who sought a position in sales at the Southern California Regional Office in November 1980 and who had a background as an insurance sales agent with the Automobile Club of Southern

Califo[illegible], testified that the receptionist at the regional office told her that she would have to take a typing test. Thereafter, a receptionist instructed her to put down her interest in a clerical position. At the interview, Ms. Pardue testified that although she stated her interest in sales, she was again asked about her typing abilities and the interviewer kept referring to clerical positions. She was never offered the AIB, given any forms to fill out, or referred to any State Farm management employee.

e. Class member Alice Wright first expressed an interest in sales in April or May of 1979 while she was a sales representative for John Hancock Mutual Life Insurance. She called the Southern California Regional Office and was told to send a resume. She sent a resume and cover letter but received no response. She was not given the AIB or any forms to fill out and was not referred to any State Farm management personnel.

Ms. Wright again expressed an interest in becoming a sales agent with State Farm in January 1981 when she went [sic] a resume, cover letter, and application to the Southern California Regional Office. She again received a rejection letter stating that there were no openings. Again, she was not offered the AIB or any forms to fill out and was not referred to any State Farm management personnel.

f. Class member Janet Boyd-Good testified that in February or March, 1979 she contacted the Southern California Regional Office about a position in sales. She testified that she was told by the Southern California Regional Office that she would have to "start out in a clerical position," relocate, and take a cut in pay. She felt discouraged. She was never asked to take the AIB, fill out

any form, or referred to any State Farm agency management personnel.

g. Class member Linda Neves testified that in January 1980 she had an interview in the Northern California Regional Office where she expressed an interest in sales. She was interviewed by State Farm Regional Office employee Larry Nazry. According to Ms. Neves, Mr. Nazry mentioned but never offered her the AIB; never gave her any forms to fill out; and never referred her to an agency manager or agency director. Ms. Neves testified that during the interview she was told "State Farm only hires once a year."

167. The active discouragement of women interested in becoming trainee agents contrasted with the active encouragement of males by State Farm agency managers, agency directors, and other State Farm management personnel. The trial record is replete with examples of such active encouragement of male prospects. For example:

a. Deputy Regional Vice President Raker testified that when he recruited for the position of trainee agent, he used State Farm's Career Presentation (Plaintiffs' Exhibit 8-10) and portrayed the career as the "golden opportunity."

b. State Farm Agency Manager Gerald E. Estabrook testified that he was recruited by State Farm agent Skip Crank to be a trainee agent in 1974. Mr. Estabrook testified that he was encouraged by Crank and told that it was an excellent opportunity to earn good income. Estabrook also testified that he was encouraged by Agency Manager Joe Fernandez and Career Agent Dennis

Rosene. Mr. Estabrook concluded that by the time he decided to seek the position of trainee agent, he believed he could net $50,000 a year, have the opportunity to run his own business, and control his own time.

c. Agency managers such as Gerald A. Estabrook created expectations in male prospects far different than the expectations created by the active discouragement experienced by plaintiffs and class members. Agency Manager Gerald Estabrook testified to the expectations of males he personally recruited to be trainee agents. As examples:

> (1) Edward Grist, appointed by Agency Manager Estabrook, at the time of his appointment believed he could earn $75,000 to $100,000 per year after five years.
>
> (2) Charles Bott, appointed by Agency Manager Estabrook, was willing to give up a $75,000 per year job as an attorney because he felt he could do better as a State Farm agent.
>
> (3) Recruit Mat Kelly, appointed by Agency Manager Estabrook, expected to earn $125,000 per year after five years as a State Farm agent.
>
> (4) Recruit William Odeski, appointed by Agency Manager Estabrook, was willing to give up a $65,000 per year job after being recruited by Mr. Estabrook.

d. Agency Manager Don Wilson encouraged his son to become an agent despite the fact his son initially did not want to become an agent and was out of state.

168. The manner in which State Farm discouraged and deterred women from applying for the trainee agent

position also contrasted with the written materials developed by State Farm and the light in which these materials cast the trainee agent position. As examples:

a. State Farm's recruiting brochure "What's Your Job Worth? Half Your Life?" (Plaintiffs' Exhibit 8-7) described the agent position as providing "a future and a career that few other fields could offer." The brochure promised a chance for advancement, high income potential, and a dynamic field"on the move" that "keeps pace with the times." The brochure also promised "security to its agents" and a feeling of "contribut[ing] to the welfare of others."

b. State Farm's Career Presentation (Plaintiffs' Exhibit 8-10) used by State Farm in its recruitment, selection and hire of trainee agents in both the Initial and Final stages (Plaintiff's Exhibit 8-11), painted the trainee agent position without a negative comment. The career presentation promised:

(1) The opportunity for increased income each year and to advance rapidly;

(2) Security through "[a]n endless market for your services, [w]ell known, highly regarded product, [p]ersonal help in getting started with complete training, and [a]ggressive promotional backup";

(3) Satisfaction because "[o]f contributing to the welfare of others" and "[s]pecial recognition by your community and your associates. . . . "

(4) The Career Presentation asked "How many positions can you think of that would offer you a better way

to build your career? Would you settle for anything less? With State Farm you won't have to."

(5) The Career Presentation promised that "[n]o financing is required" and that State Farm provided "financial assistance to give you a financial floor of stable income." The Career Presentation assured candidates that State Farm help[s] you every step of the way."

(6) The overall effort required in becoming an agent was simply described: "It's easy."

169. The active discouragement of women seeking positions as State Farm trainee agents has distorted the number of female AIB test-takers, ensuring the gross underrepresentation of women in the agency sales force.

State Farm's Application of Multiple Subjective Criteria in Plaintiffs' Recruiting, Selecting and Hiring of Trainee Agent Excludes Women From Sales Positions

170. Although there were no objective qualifications for the position of trainee agent, State Farm applied multiple subjective criteria when recruiting, selecting and hiring individuals for the position of trainee agent.

171. In defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification, defendants catalogued some of the subjective criteria which were used in the recruitment, selection and hire of trainee agents. These subjective criteria included:

a. "The desire . . . to establish, then manage an independent insurance business";

b. "The motivation . . . to establish, then manage an independent insurance business";

c. "The . . . requisite understanding to establish, then manage an independent insurance business";

d. "The requisite financial strength . . . to sustain an independent business";

e. "The . . . stability to sustain an independent business";

f. "A pattern of success in past endeavors";

g. "The ability to make a substantial investment to become a successful sales agent";

h. "Intelligence, leadership, technical ability and initiative";

i. Ability to make "extremely sensitive and subtle judgments";

j. The ability to withstand a "demanding career";

k. Excellence in "sales service and administrative ability";

l. The ability to make "extremely difficult judgments";

m. "Organizational activities";

n. "Military service";

o. "Age, marital status, sport or hobby, income, number of children and occupation of friends";

p. "The type and amount of insurance owned";

q. "References";

r. "Work history";

s. "Ability to learn and retain material";

t. "Ability to meet people easily and relate well to them";

u. "Ability to plan well and establish realistic goals";

v. "Drive to work hard";

w. "Aptitude for insurance sales and potential to perform the duties of a State Farm agent";

x. "Interest in high income, security and the satisfaction of working as a private business person";

y. "Knowledge of the product";

z. "Completion of assignments in a timely manner";

aa. "Enthusiasm";

bb. "Proficiency in using the telephone and securing prospects";

cc. "Positive attitude";

dd. "Competitive attitude";

ee. "Willingness to sell to friends";

ff. "Makes a good first impression";

gg. "Direct contact with customers in previous jobs";

hh. "Relates well with interviewer";

ii. "Willingness to work at night and/or weekends";

jj. "Willingness to work independently";

kk. "Grades in shcool";

ll. "Educational history";

mm. "Active social life";

nn. "Physical activity";

oo. "Thoughtful and realistic about future";

pp. "Perseverance"; and,

qq. "Good judgment."

172. The trial testimony supports the finding and corroborates defendants' assertions in their Memorandum in Opposition to Plaintiff's Motion for Class Certification that subjective criteria constituted virtually the sole basis for recruitment, selection and hire of trainee agents. In fact, trial testimony clarifies that there was no consistency to the subjective criteria applied; and that the subjective criteria used in any particular case would depend on the agency management employee making the particular decision. A representative sample of management testimony reflects the various laundry lists of subjective criteria used by agent management personnel in the recruitment, selection and hire of trainee agents.

a. Regional Vice President Roger Tompkins, after conceding that there were no objective qualifications for the position of trainee agent, listed "independence in business," "initiative," "integrity," "success pattern," "intellectual capability," and "willingness to stand the abrasion of dealing with the public" as the qualifications to become a trainee agent.

b. Deputy Regional Vice President Ray Wehde articulated his version of subjective criteria as "honesty,"

"ability to sell," and "occupationally disturbed" (defined by Ray Wehde as a person who perceived his own position as a "dead end job."

c. Agency Manager Warren Buckingham testified that he was looking for someone "who can manage his own budget and live within his means," "some education," "success pattern," "neatness," "ability to communicate," "sincerity," "interest," "inquisitiveness," and "creativity."

173. State Farm's instructions to its agency managers with respect to the recruitment, selection and hire of trainee agents corroborated the subjective nature of the qualifications sought and the lack of definition or guideline given agency managers in their application.

174. Plaintiff's Exhibit 31, the "Agency Manager Pre-Contract Guide and Text" suggested, without definition or guideline, the following about the recruitment of trainee agents:

a. The individual was not to have "too little education" and has to "be able to absorb enough ideas to make sales efforts worthwhile."

b. The "person must have that quality known as 'stick-to-it-tiveness.' "

c. The agency manager was to be cautious of the person who "lived too highly" although a person with "ambition" was suggested. The agency manager was admonished that they were "not interested in the person with a champagne appetite and a coke ability."

d. The agency manager was encouraged to look for prospects who are "energetic and active." Individuals

with negative attitudes toward the world were not desired.

e. The agency manager was urged to seek people who were "tolerant," had "integrity," and were "reliable."

f. Ultimately, State Farm's all male agency manager recruiting force was urged that "[t]he prospect must be a person that you like and respect. The prospect should be the kind of person from whom you would buy insurance." (Chapter 2, p. 4)

175. Recruiting was governed by these subjective criteria that had neither specific fixed content nor called for discrete judgment, and whose relationship to one another was uncertain and discretionary. The definitions provided by defense management witnesses illustrate the complete lack of definition for each criterion and its uncertain and discretionary application. For example:

a. With respect to the financial investment required, Regional Vice President Tompkins testified that "no net worth was required." While Regional Vice President Raker, Deputy Regional Vice President Wehde, and Agency Manager Buckinghman agreed with the thrust of Tompkins' testimony, each had his own definition of financial investment. Raker testified "some money" was required. Wehde testified that a candidate needed someone to "bankroll him," but provided no specificity as to the meaning of the phrase. Buckingham testified that he was looking for somebody who "could live within their means," but then stated that there was no specific definition and that he relied instead on his "judgment" and "experience." When asked about Buckingham's phrase

"live within their means," Raker testified that he could not define it.

b. With respect to educational requirements, the testimony is consistent that no particular level of education was required to become a trainee agent. Nonetheless, different management personnel looked for different educational experience for different reasons in selecting trainee agent prospects. For example, Regional Vice President Raker testified that there were no educational requirements but that he "preferred college" because it showed an "ability to stick to and complete projects." On the other hand, Agency Manager Soik testified that to be a successful trainee agent one did not need to complete even the eighth grade.

c. The clearest example of undefined multiple subjective criteria and their inconsistent and discretionary application was found in the definition of "success pattern." The testimony is uncontradicted that "success pattern" was a subjective criterion that management personnel were instructed to look for in selecting trainee agents. Nonetheless, its definition was unclear. Agency Manager Buckingham testified that success pattern "can mean many things to many people." Similarly, Regional Vice President Raker testified that success pattern "could mean a whole bunch of things depending on who you talk to."

176. In sum, the combination of qualities required to qualify as a trainee agent was virtually without limit. As explained by Regional Vice President Raker, "which qualities [were] important [was] up to each of the agency managers." As Deputy Regional Vice President Wehde

put it, "One agency manager may feel a candidate is a winner, while another does not – it depends on the agency manager." R.T. April 14, 1982, 314:8-11.

177. State Farm has never conducted a single study to validate any of the subjective criteria routinely applied in the recruitment and selection process by agency personnel.

Defendants' Claims Regarding Application of Multiple Subjective Criteria in the Recruitment, Selection and Hire of Trainee Agents

178. Defendants asserted in their Memorandum in Opposition to Plaintiffs' Motion for Class Certification and at trial that State Farm applied the aforementioned multiple subjective criteria during periods of Initial and Final Screening, the progress of which, defendants claimed, was recorded in an Agent Selection File maintained by the agency manager responsible for hiring a particular trainee agent.

179. Defendants claimed that the period of Initial Screening consisted of a preliminary interview; taking of the Aptitude Index Battery; the filling out of a personal history form; a selection interview; a reference check; an agency director interview; and an Initial Screening decision.

180. Defendants claimed that the Final Screening consisted of a health investigative report; a process of Career Presentation and Precontract Training; a Performance Expectation Conference; license study activity; agency director conference; and the filing of appointment papers.

181. State Farm further claimed that their managers recommended a particular candidate for selection to an agency director only after the candidate had been rigorously compared to at least three other candidates in a candidate selection pool. Thereafter, defendants claimed. the recommendation of the agency manager was reviewed by an agency director and finally approved by a deputy regional vice president.

182. The trial testimony however contradicts defendants' assertions with respect to the allegedly rigorous, fair, and consistent process for screening trainee agent candidates. In fact, trial testimony suports the conclusions that:

a. The application of the multiple subjective criteria was delegated without specific guidelines as to how to apply or evaluate them.

b. The lack of criteria increased the likelihood of inconsistency among the decision makers and the likelihood that the system would unfairly exclude women.

c. The sexual composition of the decision making group (primarily agency managers in conjunction with agency directors and deputy regional vice presidents) was entirely male until October 1981, when the first female agency manager was appointed.

d. The subjective criteria were applied without adequate safeguards to prevent against their arbitrary use.

The Manner in Which State Farm Selection Procedures Actually Operated

183. Defendants' claims with respect to the manner in which candidates were compared prior to selection were completely without merit.

184. The following facts in the trial record support this conclusion.

a. State Farm listed fourteen separate steps in its initial and final screening process, and, although elaborate forms existed to record an applicant's progress through the selection process (see, e.g., Defendants' Exhibit 219.2), testimony of defendants' witnesses confirmed that there were no policies or guidelines as to the manner in which each stage was to be completed and that the process itself was generally not completed. For example:

(1) Deputy Regional Vice President Wehde testified that "most agency managers do not complete the selection interview guide as designed" and that "steps can be taken out of order at the discretion of the agency manager." With respect to the manner in which to complete each stage, Wehde testified that it was discretionary with the agency manager. For example, he noted that the preliminary interview had to be completed to "the satisfaction" of the agency manager. He concluded that the decision whether or not to continue a candidate at each stage belonged to the agency manager and that no guidelines aided the manager in making his decision. As Wehde concluded: "State Farm has no policy regarding the comparing of candidates."

(2) Similarly, Regional Vice President Raker stated that agency managers had "different standards" in completing the selection process.

185. In sum, defendants' so-called initial and final screening process amounted to a series of unmonitored, unregulated and undefined oral interviews, the completion of which depended almost entirely on the agency manager's personal observation of and oral contact with the prospective trainee agent.

186. The agency manager had the discretion and ability to terminate the candidate at any stage of either the initial or final screening without review and based solely on his own subjective impressions. (See, e.g., Defendants Exhibit 219.1 indicating the complete discretion of the agency manager to terminate a prospective candidate at the preliminary interview and testimony of Agency Manager Warren Buckingham: "In the initial interview, you might formulate in your own mind that a person is not qualified.")

187. Although State Farm claimed to use an elaborate "selection pool" process for the recruitment and comparison of trainee agent candidates, their actual use was virtually nonexistent. For example:

a. Regional Vice President Tompkins testified that there were no written guidelines and/or instructions on the use of selection pools.

b. Regional Vice President Tompkins testified that there were no records of selection pools.

c. Regional Vice President Raker testified that there were no written guidelines for the use of selection pools nor for the manner in which candidates were compared.

d. Deputy Regional Vice President Wehde stated that he did not know whether selection pools were used or ever monitored and that no records of the pools used existed.

e. Agency Manager Buckingham confirmed that as an agency manager, he knew of no criteria for the admission or nonadmission of a particular individual into a selection pool.

f. Not a single defense witness above the level of agency manager could testify as having seen records of a selection pool.

g. Even in those few instances in which a State Farm management employee testified to the existence of a selection pool, not a single writing exists in evidence documenting these pools or how the decision to select a particular person from a particular pool was made.

h. In fact, the record reflects that trainee agents were often preselected without the use of a selection pool. For example, Agency Manager William Gabbard committed himself to the appointment of Ron Greek and Stan Jones *prior* to his attaining the position of agency manager. See paragraph 163d. Similarly, Agency Manager Robert Carver created a special position for Randy Frager, son of State Farm Agent Norm Frager. See paragraph 163h.

No selection pools were used for these trainee positions.

188. In sum, although State Farm listed 14 separate steps in the evaluation of prospective trainee agents, it was virtually impossible to determine how and why a candidate advanced or failed to advance through the recruitment process.

189. The actual manner in which State Farm made these subjective decisions and the manner in which trainee agents were actually appointed, recruited, selected and hired, excluded qualified females in numbers disproportionate to their availability. State Farm's decision-making process, in its reliance on the arbitrary subjective application of multiple subjective criteria accounted, in part, for State Farm's nearly all male agency force.

Defendants Have Not Presented Evidence of Business Necessity

190. Defendants failed to present any evidence that the myriad of subjective criteria applied in the recruitment, selection, and hire of trainee agents was "job-related" or the result of business necessity.

191. Further, defendants have produced no evidence that the application of such criteria were predictive of or correlated with important elements of work behavior, necessary to the safe and efficient performance of the duties of a trainee agent, or imposed because of lack of acceptable alternative policies or practices.

192. Defendants produced no evidence that its multiple subjective criteria have been validated by "professionally accepted methods" as reliable indicia of future success as State Farm agents.

193. No evidence indicates that State Farm's success as a casualty and fire insurance company and its high retention rate of agents resulted from the application of these multiple subjective criteria. State Farm's success might just as well have resulted from good advertising, good claims service, and excellent products.

194. In this regard, Regional Vice President Tompkins testified that State Farm would be number one even if 50% of its agents were women, a clear indication that State Farm's success does not depend on a 97% male sales force.

State Farm's Reliance on Nepotism in the Recruitment and Selection Process Excluded Women From Positions of Trainee Agents

195. Since 1970, State Farm appointed large numbers of male relatives of incumbent trainee agents, career sales agents, agency managers, and agency directors to fill positions as trainee agents.

196. In fact, it was the stated policy of State Farm between November 1965 and November 1977 that State Farm looked with favor upon "sons and sons-in-law, brothers, brothers-in-law, and other close relatives of State Farm agents." Exhibit A attached to Stipulation re Policy Statement Pertaining to the Employment/Affiliation of Qualified Relatives of Established Agents. That written policy also stated that more than 3% of the agency force were sons, sons-in-law, or nephews of State Farm agents and that over 11% of the local agency force were related to other agents, "the principal categories being brothers, brothers-in-law, and fathers and sons."

The statement concluded that "our purpose [is] to foster such relationships; we want more sons and relatives of our agents in the agency force." It was not until November 1977 that State Farm revised this Policy Statement to include "daughters."

197. The impact of defendants' policy favoring male relatives was reflected by statistics indicating the number of male relatives actually appointed and by numerous specific examples in the trial record of the appointment of male relatives of State Farm agents, agency managers, agency directors, and other State Farm management personnel. For exampie:

a. Three hundred eighty-three of the agents employed by State Farm during 1970 to 1981 had relatives in State Farm; of these 383 agents, 370 were male and only 13 (3.4%) were female. (Plaintiffs' Exhibit 2-8)

b. The trial testimony is replete with examples of the appointment of male relatives of incumbent trainee agents, career sales agents, agency managers, agency directors and other State Farm management personnel.

(1) Deputy Regional Vice President Ray Wehde approved the appointment of his son William as an agent in Monterey. The twin brother of Ray Wehde is a regional vice president in Illinois, and his brother-in-law is a State Farm agent in Washington.

(2) Regional Vice President Roger Tompkins testified that his father is A.W. Tompkins, an employee of State Farm for forty-one years, and now sits on the Board of Directors of the State Farm Life Insurance Company.

Roger's brother also is a State Farm regional vice president and his nephew is a field claims representative.

(3) Agency Manager Vance Basler testified that his brothers Paul and George, and his son-in-law Pat Padget are agency managers, and that his nephew Dave and his son-in-law Dave Fox are career agents.

(4) Don Fullerton testified that Jack MacInally was an agency manager, that Pat MacInally's brother Jack is a career agent, and that two of Jack MacInally's sons are agents.

(5) Agency Manager Warren Buckingham testified that he has appointed two sons of State Farm agents as trainee agents. Agency Manager Buckingham testified that he never appointed a female relative of an agent or any female at all.

(6) Agency Manager Gerald Estabrook testified that he appointed a brother of one of his incumbent agents to be a trainee agent.

(7) Agency Manager Ersel Smith testified that in 1975 he appointed the son of an agent to be a trainee agent and that he later appointed the son-in-law of that same agent to be a trainee agent.

(8) Agency Manager Richard Curtis testified that as deputy regional vice president, he approved the appointment of Glen Johnson, son of State Farm agent Larry Johnson; the appointment of William Cortland Lancaster, son-in-law of State Farm agent Hy Fegatil; and that he approved the appointment of Larry Pirrone, son of Agency Manager Manny Pirrone and nephew of Agency Manager Hugh Hagerty.

At the time of his appointment, William Cortland Lancaster had only $1,000 in the bank, had no college degree, no permanency in either residency or job experience, and was, in the words of Agency Manager Matt Madsen, "the weakest candidate he had ever presented to Mr. Curtis." Plaintiffs' Exhibit 65-39.

(9) Career Agent Gary Orgill testified that he is the son-in-law of a State Farm agent.

(10) Agency Manager Don Wilson testified that he solicited the application of and appointed his own son Roger Wilson. See also Plaintiffs' Exhibit 63-65.

(11) Agency Manager Robert Carver testified that he appointed Randy Frager, son of State Farm Agent Norv Frager, as a trainee agent.

(12) Agency Manager Hollis Showalter testified that his cousin Earl Merker is a State Farm agent in Sanger, California.

198. The use of nepotism in the appointment of male trainee agents was common knowledge among women in operations, solicitors, office managers, agency secretaries and other women who seek employment with State Farm. For example, Barbara Bryley testified that she was well aware of the appointment of male relative Randy Frager to be a trainee agent.

199. As a result of State Farm's reliance on male nepotism and the widespread knowledge of the use of male nepotism among women who might otherwise be interested in the position of trainee agent, the number of women AIB test-takers was distorted and decreased.

200. The extensive use of nepotism ensured that women were grossly underrepresented in State Farm's sales force.

Defendants Proposed "Applicant Flow Labor Pool" Consisting Solely of Women Who Took The Aptitude Index Battery Examination Is An Inaccurate and Distorted Measure of Availability

201. Defendants proposed exclusive use of a labor pool of women who took the AIB is inappropriate because it inaccurately measures the women available for the position of State Farm trainee agent. This assertion is supported by the following factors:

202. First, the term "applicant" has no meaning in the context of the recruitment, selection and hire of State Farm trainee agents because very few trainee agent candidates applied at all. Instead, State Farm recruited individuals and stimulated their interest in trainee agent positions in the hopes they would consider becoming agents. Regional Vice President Don Raker articulated this during the course of the trial:

The term applicant is not appropriate . . . very few apply . . . State Farm recruits [trainee agents], searches them out, digs them up.

203. Second, defendants' test-taker flow analyses based solely upon women who took the AIB, or any test-taker flow analysis does not take into account that certain State Farm agency managers would not hire women agents. For example:

a. On July 29, 1976, Deputy Regional Vice President Ray Wehde authored a memorandum stating that "some

agency managers refuse to hire women agents. . . . " Plaintiffs' Exhibit 88.

b. Agency Manager Linda Moore testified that "there probably are agency managers who won't hire women." She "hoped" that these managers would either "die or retire."

204. Third, defendants' test-taker flow analyses do not take into account that State Farm maintained virtually no records of individuals, such as many class member witnesses, who expressed interest in becoming trainee agents but were not offered the opportunity to take the AIB. With respect to these women and State Farm's lack of records, the trial testimony reflects the following:

a. Regional Vice President Raker testified without contradiction that there were no records of individuals who inquired about becoming trainee agents but did not take the AIB.

b. Regional Vice President Tompkins testified without contradiction that there was no way to know what conversations agency managers had with what individuals prior to taking the AIB. He further testified that agency managers were supposed to maintain records but that he had never seen any.

c. Agency Manager Warren Buckingham testified that he maintained no records of any individuals who expressed an interest in trainee agency if those individuals did not take the AIB.

d. The only records maintained by State Farm of individuals who expressed interest in becoming trainee

agents but did not the AIB are Declarations of Understanding maintained at each defendant's regional office. Even with respect to these documents, however, the record is uncontradicted that they were of recent vintage and maintained for only short periods of time. Thus, Declarations of Understanding were maintained at the Northern California Regional Office only since 1977, and at the Westlake and Southern California Regional Offices only since 1979.

e. Messrs. Hal Smith, David Hunt, and Eric Hooker, State Farm's Directors of Agency Administration at the Westlake, Southern California and Northern California Regional Offices, respectively, confirmed that the Declarations were the only records of individuals interested in becoming trainee agents who did not take the AIB and that these records only existed for short periods of time.

f. State Farm's lack of records with respect to individuals expressing an interest in trainee agency who do not take the AIB was summarized by Deputy Regional Vice President Ray Wehde who stated: "There are no records of individuals who don't sign the Declaration of Understanding or take the AIB and even the Declarations of Understanding were only used in the last few years."

g. Because of the lack of records maintained by State Farm with respect to women interested in becoming trainee agents, it is impossible to determine the number of qualified women who may have been qualified for trainee agent positions and made application and inquiry, either by oral request or in writing.

h. Despite defendants' assertions to the contrary, Professor Drogin never assumed that defendants' AIB

data tape was a complete record for purposes of measuring applicant flow. He never testified that the AIB data tape included data for persons not on the tapes – i.e., persons who applied but did not take the AIB test, persons who completed Declaration of Understanding forms but did not take the test, or women who were discouraged from taking the test. Even Dr. Singleton admitted that defendants' parity analysis only count AIB test-takers, not those who applied but did not take the test, or those who might have been discouraged from taking the test. (R.T., February 8, 1983, 42-45).

205. Fourth, test-taker flow analyses do not take in to account defendants' recruitment practices that deterred and discouraged women from applying or expressing an interest in trainee agent positions. These discriminatory recruitment practices included:

a. Reliance on an essentially all male "word-of-mouth" "talking network" of "centers of influence" to locate trainee agent candidates. See paragraphs 134-37.

b. Failure to post descriptions and notices of openings for trainee agent positions. See paragraph 144.

c. Failure to advertise for positions as trainee agents. See paragraph 139.

d. Failure to recruit or seek trainee agent prospects from pools of candidates composed primarily of females, such as State Farm's Operations Division or State Farm agency secretaries, office managers and solicitors despite the uncontradicted testimony by State Farm regional vice

presidents that operations and agency employees constituted excellent sources of trainee agents. See paragraphs 146-47.

e. Reliance on nepotism which resulted in the hiring of male relatives. See paragraphs 195-200.

f. Perpetuation of an all male State Farm agent image in the advertisement of State Farm products and State Farm's recruitment of trainee agents. See paragraphs 148-59.

g. State Farm's reputation for not hiring women. See paragraphs 156-61.

206. Fifth, test-taker flow analyses do not take into account defendants' admissions that the number of female test-takers would be greater absent State Farm's failures to recruit women. For example:

a. With respect to the recruitment of females, Deputy Regional Vice President Wehde testified that "the results are not as good as they could be." He testified that State Farm did not do an adequate job of "selling the career opportunity to women." He concluded that there "are more women out there" and that agency managers were "missing a bet in not hiring women."

b. Although State Farm had an affirmative action plan for hiring women in operations positions, it had no such plan for hiring women as trainee agents.

c. Regional Vice President Tompkins testified that State Farm did not have a sufficient flow of women applicants.

d. Agency Manager Warren Buckingham admitted that in thirty-two years as an agency manager he never recruited a women [sic] through any of his centers of influence.

e. On February 10, 1978, Don Frischmann, Vice President Agency in the Manpower Development Division promulgated the document "Training the Trainer Topics." Plaintiffs' Exhibit 28. The document directly admitted the impact of word-of-mouth recruitment by an all male agency management force on the number of women trainee agent recruits. See paragraph 137a.

f. The impact of State Farm's recruitment and selection procedures on women test-taker flow is also implicitly acknowledged by defendants in their "Agency Manager Precontract Guide and Text." (Plaintiffs" Exhibit 31) In Chapter Two, entitled "Candidate Identification," the manual asked what constituted a qualified prospect; its answer confirmed the inevitability of obtaining male recruits because of State Farm's recruiting practices. See paragraph 137b.

207. Sixth, test-taker flow analyses do not take into account the substantial amount of pre-screening that occurred prior to the time an individual took the AIB. The extensive prescreening engaged in at State Farm is corroborated by the testimony of State Farm management agency employees and by documentary evidence prepared by plaintiffs and defendants.

a. Between 1970 and the time of trial, State Farm distributed a selection interview blueprint to its agency managers for use in the recruitment and selection of trainee agents. Although the selection interview blueprint

changed over the years, every version utilized by State Farm included stages that preceded the taking of the AIB. At each step that preceded the taking of the AIB, the agency manager was given discretion to eliminate prospects from consideration. For example:

(1) Plaintiffs' Exhibit 9 (State Farm forms No. Z 5697.2) called for a "first interview" prior to the administration of the AIB. The agency manager was permitted to reject prospects at this first interview.

(2) Plaintiffs' Exhibit 13-1 (also Defendants' Exhibit 219.1) was a more recent version of the agent's selection guide. It also called for a preliminary interview prior to administration of the AIB. The Preliminary Interview section of the Agent Selection Guide (a) outlined five activities to engage in during the Preliminary Interview; (b) required the agency manager to observe the applicant's willingness to contribute time and invest capital; and (c) permitted the agency manager to discontinue the applicant prior to taking the AIB.

b. Agency Manager Warren Buckingham confirmed that during the initial or preliminary interview, an agency manager might formulate in his own mind that an individual was not qualified and discontinue the candidate from the selection process.

c. Taking the AIB commonly is preceded by a substantial amount of time spent with agency managers "explaining and discussing" and reading information about the trainee agent position. In fact, 76.1% of the male test-takers and 79.0% of the female test-takers between 1970-1981 and 89.6% of the male appointed agents and 95.7% of the female agents spent anywhere

from one to five hours in "Pretest Discussion Time" before taking the AIB. Regional Vice President Raker testified that the pretest discussion time is used to tell applicants about the process and to sell the career.

d. There is also extensive prescreening of individuals seeking to transfer from operations to agency. An individual expressing an interest in transferring from operations to agency may be denied the opportunity prior to taking the AIB. Before State Farm will approve administering the AIB to an operations employee, the individual must obtain the approval of both his supervisor and division manager. Only then is the AIB given. State Farm maintains no records of individuals screened out by supervisors and division managers in operations prior to taking the AIB.

208. Seventh, test-taker flow analyses are post hoc attempts to define the term applicant to suit defendants' needs. State Farm's own documentary evidence does not support the definition of an applicant as an individual who takes the AIB. Indeed, such a definition of applicant was constructed solely for use in this trial. State Farm recruiting brochures, Agents Selection Guides, and the testimony of State Farm agency management personnel either do not define applicant as an individual taking the AIB or reject the term applicant altogether. For example:

a. Regional Vice President Raker testified that the term applicant was "not appropriate" at all because agency managers recruit, dig up and go out and talk to people, to find trainee agent candidates.

b. Regional Vice President Raker also testified that an applicant might be someone who takes the AIB or an

individual might be an applicant *before* he takes the AIB. Raker testified that "sometimes lots of interviewing takes place before the AIB is taken." During this time, Raker explained, a candidate is told about the process to "sell the career."

c. Agency Manager Warren Buckingham testified that an individual was not an applicant until he or she took the AIB, completed the personal history form, entered a selection pool and submitted his letter requesting to become a trainee agent.

d. The Agent Selection Guide, Plaintiffs' 13-1 and Defendants' 219.1, both refer to a candidate taking part in a Preliminary Interview and signing the Declaration of Understanding prior to the taking of the AIB as applicants. Deputy Regional Vice President Ray Wehde was unable to explain the use of the term applicant in Defendants' Exhibit 219.1 in light of the definition of applicant proferred [sic] by defendants throughout the course of the litigation.

e. Similarly, defendants' recruiting brochure "Looking into a State Farm Agency Career?" (Plaintiffs' Exhibit 8-1) contains a Declaration of Understanding which is to be signed before the AIB is taken. The Declaration of Understanding contains a signature line for "applicants."

209. Eighth, test-taker flow analyses do not take into account State Farm's pattern and practice of discouraging and deterring women interested in applying to become trainee agents by ignoring them, lying to them, and/or giving them false and misleading information about the requirements for and possibility of becoming trainee agents. For example, women have been told of

educational requirements that do not exist, financial requirements not founded in fact, and false information with respect to the availability and manner of application. See paragraphs 162-66.

210. Ninth, test-taker flow analyses do not take into account the fact that State Farm subjectively applied multiple subjective criteria during the recruitment and selection process. See paragraphs 170-77.

211. All such decision made by agency managers in the recruitment and selection of trainee agents prior to administration of AIB are made without guidelines and involve the application of subjective criteria. See paragraphs 178-94.

212. Tenth, test-taker flow analyses do not take into account expert opinion with respect to the use of test-taker flow data, such as that proferred [sic] by Dr. John Pencavel, which cautions that applicant flow data should be "used with extreme care." See R.T. March 31, 1982, 103:17-20.

213. Dr. Pencavel testified that applicant flow data should only be used where:

a. Records of applications are complete both in terms of the number of applicants and the suitability of the individuals applying for the position;

b. Where there is a formal application process;

c. Where a significant amount of prescreening has not taken place; and,

d. Where individuals have not been deterred form applying by the hiring policies of the employer. R.T., April 1, 1982, pp. 331:18-333.

214. Dr. Pencavel testified that he was wary of applicant flow data because of the "active role" engaged in by the employer in "securing the potential sort of applicant he [the employer] wants which results in pre-screening. (R.T., March 31, 1982, 104:3-16)

215. Dr. Pencavel testified that the reputation of a company for not hiring a particular group of individuals may also negatively impact the applicant flow with respect to that group of people. (R.T., March 31, 1982, 104:17-23)

216. Because of these factors, rather than measuring lack of discrimination, Dr. Pencavel concluded that "Applicant Flow Data may reveal the very discrimination that one is trying to determine whether or not it exists." (R.T., March 31, 1982, 104:23-25)

217. Eleventh, test-taker analyses are flawed in that none of defendants' applicant flow analyses use the Declarations of Understanding preceding the AIB and in defendants possession and control throughout the course of the litigation. In light of the fact that many individuals expressed an interest in being a trainee agent but were not given the AIB (at least thirteen plaintiffs' witnesses so testified), the Declarations of Understanding preceding the AIB should be a more complete record of individuals interested in agency. Yet, defendants presented no evidence that the persons who signed the Declarations of Understanding were the same persons who took the AIB, the basis for their test-taker analysis.

218. Twelfth, defendants' test-taker flow analyses are further flawed in the following respects:

a. None of the defendants' statistical analyses are applicant flow analyses. Defendants' statistical exhibits measure only AIB test-takers. (Defendants' Exhibit 269.5, 269.6, 269.11, 269.12)

b. Defendants' witnesses, including Dr. Wayne Sorenson and Dr. Richard Singleton, admitted that defendants' "parity analyses" do not measure the following groups of applicants:

(1) All applicants in selection pools;

(2) Applicants who completed Declaration of Understanding forms but did not take the AIB; and,

(3) Applicants who discussed the trainee agent positions with agency managers, agency directors, and regional office personnel but who were not given the AIB.

c. Professor Pencavel testified that there is no precedent in the field of labor economics to support measurement of the availability of workers by counting test-takers.

d. Defendants' parity analyses are based on inaccurate assumptions and a statistically flawed model:

(1) Despite the fact that male applicants who failed the AIB were not eligible for appointment as trainee agents, defendants' parity analyses count all such men as eligible and available. This erroneous assumption artificially inflates the number of men available for trainee agent positions.

(2) Despite the fact that 1,353 trainee agents were actually hired during the period 1970-1981, defendants' parity analyses for this period include only 959 hires. Therefore, defendants' analyses omit 394 (29.1%) of the actual trainee agent hires during the 1970-1981 period.

(3) Despite the time lag between test taking and hire that frequently causes test-takers from one year to compete for trainee agent positions with test-takers from other years, defendants' parity analyses falsely assume that test-takers from each year compete only with people taking the test that same year.

e. Dr. Singleton conceded that any valid statistical model should fit defendants' actual employment practices as closely as possible, but the Sorenson/Singleton parity analyses do not fit State Farm's actual hiring practices.

f. The testimony of defendants' expert, Dr. Singleton, corroborates the testimony of Dr. Pencavel that applicant flow more accurately reflects a company's recruitment practices, not market labor availability. Thus, Dr. Singleton conceded that applicant flow is "a two-sided process" and that "either [there are applicants] coming forward themselves or they're encouraged by the employer." (R.T. Vol. VII 899:2-10) Dr. Singleton's admission is consistent with the testimony of Regional Vice President Don Raker that:

The term applicant is not appropriate . . . very few applied. . . . State Farm recruits [trainee agents], searching them out, and digs them up."

219. If the inaccurate assumptions and statistical flaws in defendants' analyses are corrected, a comparison

of State Farm trainee agent hires with the pool of test-takers reflects a statistically significant disparity between women hired as trainee agents and their availability in the pool of test-takers. For example:

a. Plaintiffs' Exhibit 2-17 is Professor Drogin's "Comparison of Hires to Pool of Test-takers" and shows that despite the fact test-takers represent "only the tip of the iceberg" of female availability, a standard deviation of -2.59 is observed when test-takers are properly compared with trainee agent hires (significance probability less than 1 chance in 100).

b. Plaintiffs' Exhibit 2-17 is not subject to any of the criticisms which flaw defendants' test-taker flow analysis. For example, Professor Drogin's analysis:

(1) includes all actual hires of trainee agents during 1970-1981;

(2) includes all women who took the AIB prior to its validation on April 19, 1978; and,

(3) considers the time lag between taking the AIB and date of hire. Despite defendants' criticisms to the contrary, Professor Drogin's time estimates are not unrealistic; defendants, in their Memorandum in Opposition to Plaintiffs' Motion for Class Certification, argued a five-month average time lag between AIB test and hire and Professor Drogin selected a liberal twelve-month period;

(4) assumes that some trainee agents are hired immediately after taking the AIB (indeed, some are pre-selected before taking the AIB, e.g., appointments of Ron Greek and Stan Jones.)

c. Defendants' criticism that Professor Drogin failed to incorporate a six-month precontract period is without foundation in that defendants presented no evidence that precontract takes six months and Professor Drogin's twelve month "time window" includes it anyway.

220. Even defendants' statistical expert, Wayne W. Sorenson, conceded that the overall disparity between the 14.6% female AIB test-takers and the 7.0% female trainee agent hires during 1970-1981 was "statistically significant." In fact, during 1970 through 1981, 19.8% (1258/6346) of the male AIB test-takers were hired as trainee agents, but only 8.8% (95/1083) of the female trainee agents were hired – a more than 2:1 disparity favoring males. (Plaintiffs' Exhibits 2-14 and 2-15)

Proposed Findings Re Plaintiff Muriel E. Kraszewski

221. From July, 1963 to June, 1969, plaintiff Muriel E. Kraszewski was employed as a secretary and office manager in the office of State Farm Agents George Catling and Rolland Kienzle. Her responsibilities included filing loss reports, explaining insurance coverages and quoting prices to customers and potential customers, completing insurance applications for customers, as well as secretarial and clerical duties. She performed her work well and was invited to return to work in the future if she chose to do so.

222. From June, 1969 to April, 1970, plaintiff Kraszewski was employed by Weatherby Insurance Company as a secretary to an executive vice president.

223. From April, 1970 to July, 1970, plaintiff Kraszewski was employed by Green & Leavitt, a general

insurance agency. At Green & Leavitt she quoted prices, wrote insurance policies, and sold insurance, including commercial lines.

224. From July, 1970 to June, 1971, plaintiff Kraszewski was employed by State Farm Agent Charles Clayton. At Clayton's agency, she explained insurance coverage to potential customers, quoted prices, wrote insurance policies, and solicited new insurance business.

225. In June, 1971, State Farm agent Larry Konecne asked plaintiff Kraszewski to work in his agency, where she continued to work until June 1974. At Konecne's agency, plaintiff Kraszewski explained insurance coverages to potential customers, quoted prices, wrote insurance policies, solicited new business, as well as ran the agency during Konecne's absences from the office. In June 1974, plaintiff Kraszewski went to work for State Farm agent William Grubbs as a solicitor, with the mutual understanding that she was pursuing a position as a State Farm trainee agent and that she would need time off work to pursue agency. As a solicitor for Grubbs, plaintiff Kraszewski did cold-calling and x-dating to prospective customers. Agent Grubbs testified that her work for him included "selling" State Farm insurance.

226. Plaintiff Kraszewski made numerous attempts to become a State Farm trainee agent. In Spring of 1974, she expressed her interest in becoming a State Farm agent to Agency Director Eugene Miller, Agency Managers Robert Carver and Manny Pirrone, and State Farm agent Larry Konecne.

227. Agency Director Eugene Miller and Agent Larry Konecne told her that State Farm did not hire

women agents. Miller later referred her to Agency Manager Peter Adrience regarding a possible opening in a high income area in South Pasadena. She did not contact Adriance, nor did Adriance contact her.

228. Plaintiff Kraszewski approached Agency Manager Robert Carver at a training session for State Farm secretaries, and expressed her interest in becoming a State Farm agent. He told her that she was well qualified, but that he did not have any extra files and therefore was not hiring trainee agents. He did not offer her an opportunity to take the AIB nor put her into an agent "selection pool."

229. After being refused by Carver, plaintiff Kraszewski told Agency Manager Matt Madsen that she wanted to become a State Farm agent. Madsen told her that it would be difficult for State Farm to hire a woman agent because they had no way of protecting women and that he had no files and could not hire her. He did not give her the AIB or put her into an agent selection pool.

230. Plaintiff Kraszewski next contacted Agency Manager Manny Pirrone, told him of her interest in becoming a State Farm agent, and asked to take the AIB. Agency Manager Pirrone said he did not have any AIB tests. Thereafter, Agency Director Miller contacted plaintiff Kraszewski, told her that Agency Manager Pirrone would let her take the AIB, and told her to contact Pirrone. She did contact Pirrone, and took and passed the then unvalidated AIB.

231. Plaintiff Kraszewski then contacted Agency Manager Lou Matz and expressed her interest in becoming a State Farm agent. Matz said that he could not

appoint trainee agents without some files to give trainee agents to work on, that he had no files, and therefore no openings. Matz advised her to complete a Confidential Personnel History form, but did not give her the AIB nor place her in a selection pool.

232. Plaintiff Kraszewski also contacted Agency Director Don Fullerton about her interest in becoming a State Farm agent. Fullerton neither gave her the AIB test, nor placed her in any selection pool.

233. Plaintiff Kraszewski spoke with Agency Director Eugene Miller four times regarding her interest in becoming a State Farm agent, the last time in March 1975, at the Southern California Regional Office. At this time, Miller told her that State Farm would not hire her because she did not have a college degree, had not demonstrated that she could run her own business, and was unwilling to relocate. Plaintiff Kraszewski replied that many State Farm agents did not have college degrees, that she could do the work, and that no one had offered her a trainee agent position to relocate to. Miller acknowledged that many State Farm agents did not have college degrees, but stated that a college degree was a new requirement.

234. All plaintiff Kraszewski's contacts with Agency Directors Miller and Fullerton, and Agency Managers Carver, Madsen, Pirrone and Matz were initiated by Kraszewski, except the March 1975 conversation with Miller. At that time, he called her into his office and told her State Farm would not hire her. Despite her repeatedly expressed interest in becoming a State Farm agent, no State Farm agency manager, director or deputy regional

vice president recruited her, encouraged her to pursue an agency career, nor placed her in an agent selection pool.

235. Plaintiff Kraszewski met all minimum objective requirements for the trainee agent position. Furthermore, at the time she applied for trainee agent positions, she had been a State Farm agency secretary, office manager, and solicitor for nearly twelve years, had successfully performed nearly all State Farm agent functions, had a net worth of approximately $104,000, had taken college level insurance courses, and had substantial contacts in the community. (Plaintiffs' Exhibit 84-5) Plaintiff Kraszewski understood that a State Farm trainee agent received a Specified Monthly Payment (SMP), but that there was some "risk" that such payments would not cover overhead and return a profit immediately. She was willing to accept any such "risk" to become a State Farm agent. In fact, she became a Farmers Insurance agent despite the greater risk there that she would have to pay back her monthly subsidy from Farmers if she failed as a Farmers agent (State Farm requires no pay back of the SMP for unsuccessful trainee agents).

236. In May 1975, after being turned away in her attempts to become a State Farm agent, plaintiff Kraszewski applied for and was appointed an insurance agent for Farmers Insurance Group. She has been and continues to be a highly successful insurance agent for Farmers. She frequently has been one of the top three Farmers agents in the Long Beach area.

237. Numerous trainee openings existed during the period plaintiff Kraszewski sought a trainee agent position. During 1974, State Farm hired 126 trainee agents in

California; only one was female. (Plaintiffs' Exhibit 2-6) In 1975, State Farm hired 129 trainee agents; only six were female. (Plaintiffs' Exhibit 2-6) In Los Angeles County, State Farm hired nine trainee agents during the period April 16, 1974 to July 1, 1975; all were male (Al Dijerlando, Larry Brady, Ken Anderson, Dave Pontecorvo, Leonard Hardtree, John Sinner, Bruce Bender, Robert Biby, and Glenn Higashida). (Plaintiffs' Exhibits 84-12 and 84-14) Moreover, in January 1975, shortly after he told plaintiff Kraszewski that he had no openings, Agency Manager Carver appointed Hope Yoder (male) to take over the open Conrad agency. Carver testified that he did not have an agent selection pool for the Conrad opening and that he did not consider plaintiff Kraszewski for this opening. Agency Manager Lou Matz appointed four male agents from April 16, 1974 to August 1, 1975 (Al Dijerlando, April 16, 1974; David Pontecorvo, January 1, 1975; Bruce Bender, May 1, 1975; and Larry Pirrone, August 1, 1975).

238. Defendants' claims that agency managers had to have existing files to give to trainee agents before a trainee agent could be appointed is pretextual. Numerous agency managers and agents testified that appointments were made without being given existing files. Perhaps the most prominent example is plaintiff Daisy O. Jackson, who received no files when appointed as a trainee agent. Trainee openings also were created for several male agents, including Randy Frager (son of State Farm Agent Norv Frager), Terry Lutz, and Roger Wilson (son of Agency Manager Don Wilson).

239. Defendants' claims that a college degree was required to become a trainee agent and that plaintiff

Kraszewski was less qualified than males because she did not have a college degree are pretextual. According to Plaintiffs' Exhibit 2-9, only 46.7% of State Farm agents in California had bachelor's degrees or above, 20.9% of the male agents had only high school degrees, and 7 male agents had not graduated from high school. This evidence was not contradicted at trial by defendants. In addition, four of the nine trainee agents appointed by State Farm within Los Angeles County between April 16, 1974 and July 1, 1975 did not have college degrees. (Plaintiffs' Exhibit 84-14) Moreover, Deputy Regional Vice President Robert Carver testified that some of his best producing agents did not have college degrees.

240. Defendants' claim that plaintiff Kraszewski was not hired as a trainee because she lacked "significant independent business experience" is not a requirement for hire as a trainee agent, and many male trainee agents are hired without it. (Plaintiffs' Exhibits 2-10 and 119) Furthermore, Deputy Regional Vice President Richard Curtis, who first asserted this defense in his letter to the California Fair Employment Commission (Plaintiffs' Exhibit 84-12), admitted that several of the trainee agent appointments he had approved were males without "significant independent business experience." Glenn Johnson (son of State Farm Agent Larry Johnson) was 22 years old when appointed, had no sales experience, no independent business experience, and work experience as a tire installer, custodian, liquor clerk, and an office manager and solicitor in a State Farm Agency. (Plaintiffs' Exhibit 64-49). William Cortland Lancaster (son-in-law of State Farm Agent Hy Fegatil) was 24 years old when appointed, had no college degree, no permanency in

either residence or employment, no independent business experience, only $1,000 in the bank, and was, in Agency Manager Matt Madsen's words, "the weakest candidate he had ever presented to Mr. Curtis." (Plaintiffs' Exhibit 65-39) Ken Anderson owed $27,000 to his father when appointed and his only independent business experience was in an aerospace business that went bankrupt. (Plaintiffs' Exhibit 63-2)

241. Defendants' claim that plaintiff Kraszewski was unwilling to commute or relocate to a trainee position is speculative. State Farm never offered her an opportunity to relocate or commute to a trainee position. Furthermore, plaintiff Kraszewski and her husband both testified that they had no objection to her commuting a substantial distance for a trainee agent position. The fact that plaintiff Kraszewski has commuted for nearly eight years from her home in Anaheim to her Farmers Insurance Agency in Long Beach confirms this testimony.

242. Defendants' claim that plaintiff Kraszewski was unqualified to become a trainee agent because her husband allegedly indicated that he was unwilling to allow her to work nights and weekends is pretextual. Plaintiff Kraszewski and her husband, Robert Kraszewski, denied that Robert had ever indicated that he would not permit his wife to work nights or weekends; both testified that she was willing to work nights and weekends as a State Farm agent and that husband Robert had no objections. This testimony was corroborated by the fact that shortly after being turned down by State Farm, plaintiff Kraszewski became an insurance agent for Farmers Insurance Group and frequently worked nights and weekends – without objection by her

husband. Plaintiff Kraszewski continues to work nights and weekends as a Farmers agent – also without objection from her husband, who testified that he appreciated her earning capacity as an insurance agent.

243. Plaintiff Kraszewski testified that no State Farm agency manager, agency director or deputy regional vice president ever asked her if she was willing to work nights and weekends as a State Farm agent; the testimony of Deputy Regional Vice President Richard Curtis and Agency Manager Matt Madsen corroborates this testimony.

Proposed Findings Re Plaintiff Daisy O. Jackson

244. Plaintiff Jackson was employed by Career Agent Edward Borgia from April 1973 through December 1975 as an agency secretary and office manager.

245. The testimony is uncontradicted that between August 1973 and December 1975, plaintiff Jackson performed all Agent Borgia's duties. During this time period, plaintiff Jackson was assisted by agency secretary Lorraine Reider. The testimony is uncontradicted that between August 1973 and December 1975, Mr. Borgia was rarely in the office because he was a full time practicing personal injury lawyer.

246. Former career agent and current Agency Manager Borgia testified that plaintiff Jackson performed each and every task of a State Farm agent while she was employed by him as office manager; that he was rarely in his agency office; that plaintiff Jackson occupied his office at the agency; and that on those rare occasions when he

came to the office, he worked in the back room with the "dead files."

247. Plaintiff Jackson was compensated based on the percentage of her sales. The compensation agreement between plaintiff Jackson and agent Borgia provided that plaintiff Jackson would receive 37 percent of the gross less 50 percent of the office expenses.

248. During the time that plaintiff Jackson acted as the agent at the Borgia agency, the agency thrived:

a. In 1974, agent Borgia won a trip to Europe based on the sales made by plaintiff Jackson and agency secretary Lorraine Reider.

b. In 1975, the Borgia agency ranked second among all agencies within the jurisdiction and control of Agency Manager Don Wilson. (Plaintiffs' Exhibit 99)

c. In 1975, the Borgia/Jackson agency was tied for number one in health sales (a traditionally difficult area of sales for State Farm agents) among all agencies within the jurisdiction and control of Agency Manager Don Wilson (Plaintiffs' Exhibit 99)

d. Each year that plaintiff Jackson served as the de facto agent at the Borgia agency, the agency experienced a growth in all areas of sales. The consistent pattern of growth achieved by Agent Jackson is reflected in Plaintiffs' Exhibit 85-8.

249. Plaintiff Jackson first expressed an interest in becoming a trainee agent prior to April 1973 when she applied with agent Borgia to be his secretary/office manager. At that time, agent Borgia discouraged her and told her that "she could make more as his secretary," and that

she should stay with the Borgia agency rather than seek a trainee agent position of her own.

250. At the time of plaintiff Jackson's hire by agent Borgia, plaintiff Jackson was trained by agent Borgia's agency manager Don Wilson, Plaintiff Jackson testified that the training which she successfully completed consisted of the same precontract training provided prospective agents.

251. During her training in 1973, plaintiff Jackson asked Agency Manager Wilson about the possibility of becoming an agent. He told plaintiff Jackson that she was better off remaining a secretary in the Borgia agency and that State Farm was not hiring women agents. He concluded that the type of individuals State Farm was looking for were "young men who had college degrees who could become managers."

252. Agency Manager Wilson's testimony confirms that he told plaintiff Jackson that he was looking for young married men with college degrees who could progress to management; that he felt secretaries were better off remaining with their agents rather then becoming agents themselves; that he preferred not to take a good secretary from an agent; and that he liked to see wives of agents act as secretaries for their husbands.

253. Despite the fact that Agency Manager Wilson was aware of plaintiff Jackson's interest in becoming an agent, he did not inform her of available trainee agent positions. In fact, within six months of his 1973 conversation with plaintiff Jackson about her interest in becoming a trainee agent, one of Agency Manager Wilson's agents, George Seifert, died. Although Agency Manager Wilson

intended to fill the position created by the death of Agent Seifert, he never informed plaintiff Jackson regarding its availability. Instead he appointed his son, Roger Wilson, to fill the Seifert position, effective June 1, 1974. (Plaintiffs' Exhibit 63-65)

254. Agency Manager Wilson testified that Roger was living out of state, did not have any community contacts, and had to be persuaded to return to California to accept the trainee agent appointment.

255. Plaintiff Jackson next inquired about being a trainee agent in early 1975 when she learned that agent Borgia was being considered for the position of Agency Manager.

256. At that time, she asked agent Borgia about becoming an agent if, in fact, he became an agency manager. Agent Borgia informed Ms. Jackson that:

a. She needed a college degree;

b. State Farm frowned on making secretaries agents; and,

c. It was against State Farm's policy to hire women agents because women could not do the job.

257. In May or June 1975, plaintiff Jackson testified that while inspecting a property in Woodside with agent Borgia she again inquired about becoming an agent. At this time, agent Borgia told her that "insurance is like law and medicine, no one wants to talk to a woman."

258. In the spring of 1975, plaintiff Jackson was finally permitted to take the AIB, nearly two years after

her first inquiries about agency with agent Borgia and Agency Manager Wilson.

259. Plaintiff Jackson was appointed trainee agent effective February 1, 1976.

260. On January 5, 1976, just prior to plaintiff Jackson's appointment, newly appointed Agency Manager Borgia recommended plaintiff Jackson to his Agency Director Jay Butler as follows:

"Daisy has a unique gift for selling and gaining the confidence of people. Her ability to work is awesome. . . . I believe Daisy has the potential of becoming the greatest female agent in the Company and one of the best agents in any category." (Letter Borgia to Butler, January 5, 1976. Plaintiffs' Exhibit 85-13)

261. Six weeks after appointment as agent, plaintiff Jackson attended defendants' Personal Selling Skills School (PSS). On March 18, 1976, while returning from PSS School, plaintiff Jackson suffered a pulmonary embolism described as a blood clot in the lung. Plaintiff Jackson's pulmonary embolism destroyed the lower one-half of one lung and left her in a coma for a week.

262. Plaintiff Jackson remained in the hospital for two weeks and was released during the first week in April 1976.

263. Against doctors' orders, plaintiff Jackson returned to work the third or fourth week in April. Plaintiff Jackson testified that she disregarded her doctors' order because she feared that her failure to return to work would jeopardize her position as a trainee agent.

264. During the first week in May of 1976, plaintiff Jackson returned to the hospital with a recurrence of her

pulmonary problems. She remained in the hospital for one week.

265. Upon her release from the hospital in May, plaintiff Jackson testified that she again ignored her doctors' orders and returned to work because she feared she might lose her trainee agent position.

266. Plaintiff Jackson's fears were well-founded. Despite the fact that her production records (numbers of policies sold) had been impacted by her serious illness in every month of her trainee agency save the month of February 1976, Agency Manager Borgia testified that he told plaintiff Jackson in mid-June 1976 that she would be terminated within 90 days unless her production increased.

267. In fact, Agency Manager Borgia, in concert and with the approval of his Agency Director Butler and Deputy Regional Vice President Wehde terminated plaintiff Jackson in July 1976, only 30 days after the 90-day probationary period began.

268. Agency Manager Borgia testified that he did not take plaintiff Jackson's illness into account when he terminated her. Agency Manager Borgia testified that he still did not know what had been wrong with plaintiff Jackson.

269. Agency Manager Borgia claimed that the reason for the termination within 30 days of plaintiff Jackson's supposed 90-day probationary period was that plaintiff Jackson committed acts of "gross insubordination."

270. Agency Director Butler similarly testified that he did not take plaintiff Jackson's illness into account when he approved her termination. Agency Director Butler testified that the decision to terminate plaintiff Jackson had "been in his mind" long before Agency Manager Borgia terminated her.

271. Deputy Regional Vice President Wehde ultimately approved the termination of plaintiff Jackson. Wehde testified that he took her illness into account, but that he approved the termination because her production was down. During the course of his testimony, Deputy Regional Vice President Wehde never mentioned Borgia's stated reason for Jackson's termination, i.e., alleged "gross insubordination."

272. In sum, the testimony reflects that the termination of Daisy Jackson was not justified on the basis of "gross insubordination," but rather on alleged lack of production.

Defendants' rationale for the termination of plaintiff Jackson was pretextual. In fact, plaintiff Jackson was terminated because she is a female, in violation of 42 U.S.C. 2000e et seq.

273. The pretextual nature of the stated reasons for the termination of plaintiff Jackson is evidenced by a comparison with her male counterpart, Michael Bonasera, who was also terminated because of poor production after a serious illness. A comparison of plaintiff Jackson with Bonasera reflects the following:

a. Bonasera was appointed trainee agent by Agency Manager Roy Soik in defendants' northern region in May

1975, nine months prior to plaintiff Jackson. He was terminated in November 1976. Deputy Regional Vice President Ray Wehde was ultimately responsible for approving the termination of both plaintiff Jackson and Bonasera.

b. Bonasera did not become ill until the sixth month of his trainee agency. Still, Bonasera's production fell below "minimum expected" levels in four of his first five months as a trainee agent (-33.3% the first month, -57.9% the third month, -30.0% the fourth month, and -61.5% the fifth month. Letter to Deputy Regional Vice President Ray Wehde and Agency Director Mark Walp from Agency Manager Roy Soik dated November 24, 1975 and part of Plaintiffs' Exhibit 64-97, also Defendants' Exhibit 91).

c. During the first five months of his trainee agency male comparable Bonasera was not disciplined or placed on probation by the company despite the fact his production was down 33.3 percent. (90 applications expected/60 actually written) (Plaintiffs' Exhibit 64-97)

d. In his letter to Messrs. Walp and Wehde, Mr. Soik noted that Mr. Bonasera suffered a serious illness in the sixth month of his trainee agency (October 1975) and stated that Mr. Bonasera might have to be terminated if he did not turn his production around in November and December 1975. (Plaintiffs' Exhibit 64-87) Agency Manager Soik also noted that Bonasera's life volume "is one of the lowest we've experienced for a new trainee. . . . "

e. Bonasera did return to work until February 1976. At that time, Agency Manager Soik testified that Bonasera no longer had "health problems." Nonetheless, in February 1976 his production was off 18.2% and in March

his production was off 34.6%. Despite the fact that Bonasera's production had been down a total of six of the seven months he was a trainee agent, Agency Manager Soik testified that he still did not consider terminating him. He testified that he wanted to be "absolutely sure" before he took action.

f. In April 1976, Bonasera's production was off 38.5% and only then did Agency Manager Soik place agent Bonasera on 90 days probation.

g. Bonasera received an additional eight months before he was finally terminated in November 1976. Agency Manager Soik testified that he told Bonasera "three strikes and you're out."

h. Deputy Regional Vice President Wehde approved the termination of Agent Bonasera as he had the termination of plaintiff Jackson.

i. Both plaintiff Jackson and Bonasera did not validate in the first month of their trainee agency. Long term Agency Manager Soik testified that failure to validate in the first month of trainee agency or in the first six weeks was not a concern because "you need 12-16 weeks to be established as a trainee agent."

j. Bonasera was given "three strikes" and nineteen months to prove himself as a trainee agent, including five months of poor production before he became ill and an additional four months of poor production after he recovered from his illness. Plaintiffs' Exhibit 64-97; Defendants' Exhibit 91.

k. On the other hand, plaintiff Jackson was terminated after only six months in spite of the fact that she

was ill and/or in the hospital for 4-1/2 of those months. The only period in which plaintiff Jackson was healthy and working as a trainee agent was the first six weeks of her trainee Agency which Agency Manager Soik testified should not be a concern because of the 12-16 weeks it takes to establish one's self as an agent. Plaintiff Jackson was never permitted to have 12-16 weeks to establish herself when she was healthy. The long term concern exhibited for Bonasera was totally lacking for plaintiff Jackson.

l. There is no justification for the difference in treatment between Bonasera and plaintiff Jackson. In fact, other attacks leveled at plaintiff Jackson during the course of the trial (e.g., lack of organization, failure to set priorities) were the same criticisms leveled at Bonasera by Agency Manager Soik in his testimony at trial. See Plaintiffs' Exhibit 64-97.

274. In addition, plaintiff Jackson was treated differently than her male counterparts in the following manner:

a. She was not given files to help her start her agency by Agency Manager Borgia. Instead, Borgia gave files to two male agents, McClure and Wallace, who he appointed at the same time, and a third male agent Chris Roden. The files given these males were, in fact, files sold by plaintiff Jackson while she ran Agency Manager Borgia's agency and he practiced law full time.

b. Plaintiff Jackson was given an isolated office in South Palo Alto whereas new Agents McClure and Wallace were permitted to share office space with Agency Manager Borgia in downtown Palo Alto where potential

business was greater and where they could share expenses and lessen any financial burden in the beginning months of their agency.

275. Plaintiff Jackson was hired as a sales agent by Farmers Insurance Group subsequent to her termination and was a successful Farmers agent.

276. Plaintiff Jackson was not appointed to the position of trainee agent before 1976 because she is a woman. In fact, plaintiff Jackson was qualified to become a trainee agent as early as November 1973.

Proposed Findings Re Plaintiff Wilda Tipton

277. Plaintiff Wilda Tipton has been employed as a secretary and office manager in two State Farm agencies in the Oxnard-Ventura area since 1967.

278. At the present time, plaintiff Tipton is employed by State Farm Career Agent John Carman for whom she has worked since 1980.

279. Between 1967 and 1980, plaintiff Tipton was employed by State Farm Career Agent William Bremmer as a secretary, office manager and solicitor. During the nearly thirteen years that plaintiff Tipton was employed by agent Bremmer, she performed virtually all the duties of a career agent including the sale of State Farm's multiple lines of insurance, both inside and outside the office.

280. Specifically, plaintiff Tipton, who received her solicitor's license in 1966, sold auto, fire and health insurance as well as life insurance outside the office when accompanied by Agent Bremmer.

281. Agent Bremmer recognized that plaintiff Tipton's sales of insurance merited additional compensation. As a result, he paid plaintiff Tipton based on a percentage of the business sold by the Agency.

282. Agent Bremmer testified that plaintiff Tipton's work performance was excellent and confirmed that she solicited business in and out of the office.

283. Plaintiff Tipton first expressed an interest in becoming a State Farm agent in 1969. At that time, while employed by Agent Bremmer, she spoke with Agent Bremmer's agency manager, Mr. White. Plaintiff Tipton testified that Mr. White informed her that it was "not possible [for her to become an agent]" and that he "didn't want to talk about it." Plaintiff Tipton testified that after these conversations with Mr. White she believed it was impossible for her to become an agent.

284. Plaintiff Tipton next inquired about becoming an agent in 1974 when she spoke with agency manager Wes Hicks who had replaced Mr. White as Mr. Bremmer's agency manager.

285. Although Agency Manager Hicks permitted plaintiff Tipton to take the AIB, she testified that Hicks discouraged her and told her that her chances were "not very good." In addition, he told plaintiff Tipton that a two year college degree was required to become a trainee agent.

286. Agency Manager Hicks also told plaintiff Tipton that his agency director did not believe plaintiff Tipton could "compete with other people in the pools." During the course of the trial, defendants never specified

who the agency director was, the underlying facts upon which the agency director based his "negative response," or the selection pool and individuals therein with whom plaintiff Tipton supposedly could not compete.

287. Nonetheless, plaintiff Tipton continued to be interested in becoming an agent and told Agency Manager Hicks that she would get the degree he stated was required.

288. After her 1974 conversation with Agency Manager Hicks, plaintiff Tipton returned to school and completed 50 units. In addition, plaintiff Tipton completed several insurance industry courses.

289. Between 1974 and 1978 Agency Manager Hicks appointed six agents in the Oxnard-Ventura area: Donald Koeberle, 9/1/74; Robert Greene, 11/1/74; John M. Derr, 1/16/75; James J. Beatty, 6/1/75; William Busch, 7/1/76; and Isaac Taylor, Jr., 1/1/77. Plaintiff Tipton was never informed of these openings.

290. In 1978, plaintiff Tipton asked Agency Manager Hicks whether she could be considered for an opening that existed in the Oxnard-Ventura area.

291. Agent Bremmer testified that he heard about plaintiff's interest in the opening and called Agency Director Vern Gallagher to tell him that he strenuously opposed plaintiff Tipton's appointment.

292. Agent Bremmer testified that his opposition was based on his fears that plaintiff Tipton would steal his files. On cross-examination, Agent Bremmer could not provide a single example of any disloyalty or dishonesty

on the part of plaintiff Tipton or provide any other evidence to substantiate his fears. Agent Bremmer admitted that he had never opposed the appointment of a male agent.

293. Agency Manager Hicks was aware of Agent Bremmer's opposition to the appointment of plaintiff Tipton in 1978. He also testified that despite plaintiff Tipton's acknowledged interest in filling the vacancy, he did not consider her or allow her to compete for the opening. Agency Manager Hicks articulated no reason why he did not consider or permit plaintiff Tipton to compete for the vacancy.

294. Instead, in April 1978, Agency Manager Hicks appointed a male, Steve Abrahams, as trainee agent. Abrahams was only 26 years old at the time of his appointment and had no prior sales experience.

295. Agency Manager Hicks testified that a selection pool existed for the Abrahams' appointment although he could not specify anyone in it. In any case, he testified that plaintiff Tipton was in the pool "in name only."

296. Mr. Abrahams was terminated within a year because of poor performance.

297. In June 1978, after Agency Manager Hicks refused to consider plaintiff Tipton for the vacancy filled by Mr. Abrahams, plaintiff Tipton and her husband Otis Tipton met with Agency Manager Hicks and Agency Director Vern Gallagher regarding the possibility of plaintiff Tipton becoming a trainee agent.

298. At the meeting, Gallagher acknowledged that he was aware of Agent Bremmer's opposition to the appointment of plaintiff Tipton in the Oxnard area. Agency Director Gallagher told plaintiff Tipton that because of Agent Bremmer's opposition, she would not be appointed in the Oxnard area.

299. Agency Director Gallagher also told plaintiff Tipton that Agent Bremmer's opposition aside, the Oxnard area was saturated with agents and that no further appointments would be made there.

300. Gallagher's statement regarding Oxnard appointments proved to be untrue. In July 1979, Agency Manager Wes Hicks appointed Terry Lutz (male) to a trainee agent position in Oxnard.

301. Agency Manager Hicks candidly testified that despite his knowledge of plaintiff Tipton's interest in the position he neither informed her or considered her for the position filled by Lutz.

302. Agency Manager Hicks testified that the reason he refused to permit plaintiff Tipton to compete for the position was that he had wanted to appoint Lutz in 1978 and "felt bad" that he had not. Hence, he appointed him in 1979. Hicks concluded that he felt no need to contact plaintiff Tipton because he believed Lutz to be qualified.

303. Agency Manager Hicks' failure to permit plaintiff Tipton to compete for the 1979 Oxnard vacancy was the second time he had filled a trainee agent position in the Oxnard-Ventura area without considering plaintiff Tipton – the first time being in 1978 when he appointed Steven Abrahams as a trainee agent.

304. Thereafter, Agency Director Gallagher referred plaintiff Tipton to Agency Manager Robert Larkin who was filling vacancies in the Simi Valley area.

305. Plaintiff Tipton testified that she met with Agency Manager Larkin on two separate occasions in September 1978.

306. At the first meeting, Agency Manager Larkin asked plaintiff Tipton about relocating and working nights. Plaintiff Tipton informed Agency Manager Larkin that she would consider relocating and that she would work nights. Plaintiff Tipton testified that after the first meeting she was not hopeful of receiving an appointment.

307. At the second meeting, arranged at the request of plaintiff Tipton, plaintiff Tipton brought her husband Otis because she felt Agency Manager Larkin had been very unsupportive at the first meeting.

308. During the course of the second meeting the issues of night work and relocation again were discussed. Plaintiff Tipton again indicated that relocation was possible and that she was willing to work nights. Plaintiff Tipton testified that after the second meeting she was not hopeful of receiving an appointment.

309. At the second meeting, plaintiff Tipton testified that Agency Manager Larkin told her that most of his agents were men and that this would present a problem for plaintiff Tipton. He also stated: "Women can't handle this position."

310. Plaintiff Tipton's husband, Otis, who was the former Chief of Police of the City of Oxnard, corroborated plaintiff Tipton's account of the second meeting with Agency Manager Larkin.

311. After the conclusion of the second Larkin meeting, plaintiff Tipton attempted to contact Agency Manager Larkin but without success. Plaintiff Tipton testified that Agency Manager Larkin did not return calls; that she was discouraged; and that she believed she was being "strung along."

312. Plaintiff Tipton testified that when she discovered that Lutz had been appointed she was furious and contacted plaintiffs' counsel who had just filed this action on behalf of plaintiffs Kraszewski and Jackson.

313. Plaintiff Tipton is currently employed as a State Farm agency office manager, is qualified to be a trainee agent, and remains available for appointment as a trainee agent.

314. Plaintiff Tipton was not appointed as a trainee agent because she is a female.

The Requirements of Rule 23 are Satisfied

315. The action is properly certified as a Rule 23(b)(2) class action.

316. The facts pertinent to the class allegations herein are as follows:

Numerosity

317. During the period 1970 to 1981, 1083 women took the Aptitude Index Battery of tests at State Farm.

318. The 1083 women who completed the Aptitude Index Battery examination satisfy the numerosity requirements of Rule 23.

319. In addition, thousands of women were deterred and/or actively discouraged from applying for the position of trainee agent by State Farm's recruiting policies, State Farm's all male image, State Farm's arbitrary application of multiple subjective criteria by its predominately male management force, State Farm's misrepresentation of the availability of and requirements for trainee agent positions to interested women, and State Farm's use of nepotism.

Commonality

320. Plaintiffs' actions raise the following questions common to the entire class:

a. Whether or not there were women qualified for trainee agent positions within the population and/or labor force;

b. Whether or not such women have been denied equal recruitment and selection opportunities for trainee agent positions;

c. Whether State Farm has violated the rights of plaintiffs and plaintiff's class by delegating to predominately male supervisors the discretion to make subjective

determinations with respect to the recruitment, selection and hire of trainee agents.

321. Commonality is also supported by the centralized nature of State Farm's personal system. This centralization is reflected in the following facts:

a. State Farm in theory utilizes a uniform Selection Interview Blueprint, Personal History Form, and Agent Selection Guide in selecting trainee agents. These selection documents were developed at State Farm's home office.

b. Trainee agents enter into a uniform employment contract, called the "State Farm Agency Building Plan."

c. All trainee agents are subject to a minimum two-year training program.

d. All trainee agents solicit only State Farm products.

e. The responsibility for recruitment, selection and hire of trainee agents is shared by all members of management, including agency managers, agency directors, deputy regional vice presidents and regional vice presidents.

f. The final authority to select trainee agents is centralized – exercised at the highest level of management.

322. The nature of the unlawful employment practices – the failure to recruit and select women as sales agents – is one that has affected and continues to affect a large number of women.

323. Class membership is highly homogeneous, as only women are included and only one job position –

trainee agent – is at issue. Plaintiffs' action is not an across-the-board case involving hundreds of diverse job positions brought by plaintiffs on behalf of sexual and multi-racial classes.

324. The length of time span covered by the allegations is 1974 through the present. The recruitment and selection process and the recruitment and selection criteria for trainee agents have remained essentially the same throughout this period.

Typicality

325. Plaintiffs' individual and class allegations are nearly identical.

326. In fact, testimony of each of the individual plaintiffs as well as the sixteen class members who testified at trial, revolves around the same consistent theme – they attempted to become trainee agents but were lied to, misinformed, and discouraged in their efforts to attain the entry level sales position.

327. The legal theory upon which both individual and class allegations are being pursued is identical.

328. The relief sought for the individual plaintiffs and class members is identical.

329. The major focus of plaintiffs' individual claims is on defendants' deterrence and failure to recruit, select and hire women as State Farm trainee agents.

330. The exclusive focus of this lawsuit and trial is one job position – trainee agent.

331. Plaintiff Daisy O. Jackson's claim is typical of other class members despite the fact she was eventually appointed to the position of State Farm trainee agent. Ms. Jackson, sought to become a trainee agent for nearly three years before her actual appointment. As with the other plaintiffs and class members, she was lied to, misinformed, and discouraged in her efforts to become a State Farm sales agent. See paragraphs 244-72.

Adequacy of Representation

332. Plaintiffs' counsel are qualified, experienced, and generally able to conduct the litigation effectively.

333. The interests of plaintiffs are in no way antagonistic to those of the class.

334. The individual allegations of plaintiffs are consistent with the statistical portrait of State Farm set forth herein.

335. The relief prayed for in the Complaint will benefit plaintiffs and the class alike.

336. The interests of Daisy O. Jackson do not conflict with the class despite the fact that she is a former State Farm trainee agent.

337. In fact, Ms. Jackson was treated in precisely the same way as the other plaintiffs and class members in her efforts to become a trainee agent.

338. There is no evidence of collusion warranting a finding that the interests of the plaintiffs or class counsel are antagonistic to the class.

339. The fact that plaintiffs Kraszewski, Jackson and Tipton may seek employment with State Farm in the future does not make their interests antagonistic to class members currently employed by State Farm since the alleged antagonism is merely speculative rather than actual.

Applicability of Rule 23(b)(2)

340. Plaintiffs' action challenges defendants' employment practices – i.e., recruitment, selection and appointment policies and practices for the position of State Farm trainee agent.

341. Plaintiffs seek declaratory and injunctive relief on a classwide basis to end defendants' discriminatory employment practices. In addition, plaintiffs seek monetary relief on behalf of class members who suffered discrimination.

342. Defendants' actions of discrimination have affected the entire class.

343. The monetary relief sought by plaintiffs on behalf of the class is equitable in nature in that discrimination is alleged on a classwide basis, injunctive and declaratory relief are sought to correct those discriminatory practices and monetary relief is sought pursuant to the "make whole" remedies of Title VII.

344. To the extent that any of the following Conclusions of Law are deemed to be Findings of Fact, they are incorporated herein by reference.

CONCLUSIONS OF LAW

To the extent any of the foregoing Findings of Fact are deemed to be Conclusions of Law, they are incorporated herein by reference.

1. This Court has jurisdiction of this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(3), 28 U.S.C. § 1343(3) and § 1343(4). Venue lies properly in this District pursuant to 28 U.S.C. § 1391(b) and (c) and 42 U.S.C. § 2000e-5(f)(3).

2. Defendants are "employers" within the meaning of 42 U.S.C. § 2000e-5(b). Court's May 13, 1983 Order Denying Defendants' Motion to Dismiss; Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883, 24 FEP Cases 859 (9th Cir. 1980); Sibley Memorial Hospital v. Wilson, 488 F.2d 1338, 1341, 6 FEP Cases 1029 (D.C. Cir. 1973); Spirit v. Teachers Insurance and Annuity Association, 475 F.Supp. 1298, 1308, 20 FEP Cases 738 (S.D.N.Y. 1979).

3. Pursuant to Federal Rule of Civil Procedure 23(b), this action was appropriately maintained as a class action on behalf of all female applicants and deterred applicants who, at any time since July 5, 1974, have been, are, or will be denied recruitment, selection and/or hire as trainee agents by defendant companies within the State of California. The Court is satisfied that all the requirements of the rule, including numerosity, commonality, typicality, and adequacy of representation have been met. See, Gibson v. Local 40, Supercargoes & Checkers, 543 F.2d 1259, 13 FEP Cases 997 (9th Cir. 1976); Social Services Union v. County of Santa Clara, 609 F.2d 944, 21 FEP Cases 684 (9th Cir. 1979); Ellis v. Naval Air Rework Facility, 404 F.Supp. 291, 13 FEP Cases 1782 (N.D.

Cal. 1975); Gay v. Waiters Union, Local 30, 549 F.2d 1330, 14 FEP Cases 995 (9th Cir. 1977); Harriss v. Pan American World Airways, Inc., 74 F.R.D. 24, 15 FEP Cases 1640 (N.D. Cal. 1977); Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 18 FEP Cases 1645 (N.D. CAL. 1978); Bernardi v. Bergland, 18 FEP Cases 1180 (N.D. Cal. 1977); Walthall v. Blue Shield of California, 16 FEP Cases 626 (N.D. Cal. 1977); Martinez v. Bechtel Corp., 11 FEP Cases 898 (N.D. Cal. 1975); Pate v. A.C. Transit, 21 FEP Cases 1227 (N.D. Cal. 1979). The Court finds no reason to decertify the class certified on September 9, 1981. Kraszewski v. State Farm Insurance Co., 27 FEP Cases 27 (N.D. Cal. 1981). Plaintiffs' claims are common to and typical of the class claims and the class is appropriate in light of General Telephone Co. v. Falcon, 457 U.S. 147, 28 FEP Cases 1745 (1980).

4. Statistical evidence played a major role in this action. The use of such evidence is clearly appropriate, for statistical analysis has always served an important function in Title VII litigation. Teamsters v. United States, 431 U.S. 324, 339, 14 FEP Cases 1514 (1977); Hazelwood School District v. United States, 433 U.S. 299, 15 FEP Cases 1 (1977); O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 28 FEP Cases 1690 (1982); United States v. Ironworkers, Local 86, 443 F.2d 544, 3 FEP Cases 496 (9th Cir. 1971). Statistics alone often have been found sufficient to establish a prima facie case of employment discrimination. Dothard v. Rawlinson, 433 U.S. 321, 15 FEP Cases 10 (1977); Kelly v. American Standard, Inc., 640 F.2d 974, 25 FEP Cases 94 (9th Cir. 1981); Gibson v. Local 40, Supercargoes & Checkers, supra; Kaplan v. IATSE, 525 F.2d 1354, 11 FEP Cases 872 (9th Cir. 1975); Davis v. County of

Los Angeles, 566 F.2d 1334, 16 FEP Cases 396 (9th Cir. 1977), vac. on other grounds, 440 U.S. 625, 19 FEP Cases 282 (1979).

5. Plaintiffs' statistical evidence utilized appropriate measures of population, workforce, and labor market availability and is supported by prevailing Title VII case law. Teamsters v. United States, 431 U.S. 324, 14 FEP Cases 1514 (1977); Hazelwood School District v. United States, 433 U.S. 299, 15 FEP Cases 1 (1977); Heagney v. University of Washington, 642 F.2d 1157, 26 FEP Cases 438 (9th Cir. 1981); Piva v. Xerox Corp., 654 F.2d 591, 26 FEP Cases 1267 (9th Cir. 1981); O'Brien v. Sky Chefs, 670 F.2d 864, 28 FEP Cases 1690 (9th Cir. 1982); Lynn v. Regents, University of Calif., 656 F.2d 1337, 28 FEP Cases 410 (9th Cir. 1981); United States v. Ironworkers, Local 86, 443 F.2d 544, 3 FEP Cases 496 (9th Cir. 1971); Gibson v. Local 40, Supercargoes & Checkers, 543 F.2d 1259, 13 FEP Cases 997 (9th Cir. 1976); Davis v. County of Los Angeles, 556 F.2d 1334, 16 FEP Cases 396 (9th Cir. 1977), vac. on other grds., 440 U.S. 625, 19 FEP Cases 282 (1979); Kaplan v. IATSE, 525 F.2d 1354, 11 FEP Cases 872 (9th Cir. 1975); Smith v. Union Oil of California, 17 FEP Cases 960 (N.D. Cal. 1977); LULAC v. City of Santa Ana, 410 F.Supp. 873, 12 FEP Cases 651 (C.D. Cal. 1976).

6. Defendants' subjective recruitment and selection practices strengthen the inference of discrimination from plaintiffs' statistical data. Lynn v. Regents, University of Calif., 656 F.2d 1337, 27 FEP Cases 410 (9th Cir. 1981); O'Brien v. Sky Chefs, 670 F.2d 864, 28 FEP Cases 1690 (9th Cir. 1982); Houston v. Inland Marine Industries, 29 FEP Cases 557, 558 (N.D. Cal. 1982); Rowe v. General Motors, 457 F.2d 348, 4 FEP Cases 445 (5th Cir. 1972); Brown v.

Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382-83, 4 FEP Cases 514, 518-19 (4th Cir. 1972), cert. den. 409 U.S. 982, 5 FEP Cases 149 (1972); United States v. Hazelwood School District, 13 FEP Cases 1161 (8th Cir. 1976); Davis v. Califano, 613 F.2d 272, 21 FEP Cases 272 (D.C. Cir. 1979).

7. The availability data "refinements" sought by defendants are unprecedented and unjustified. DeMedina v. Reinhardt, 686 F.2d 977, 29 FEP Cases 1084 (D.C. Cir. 1982); Trout v. Hidalgo, 517 F.Supp. 873, 28 FEP Cases 641 (D.D.C. 1981), aff'd, 702 F.2d 1094, 31 FEP Cases 286 (D.C. Cir. 1983); Vuyanich v. Republic National Bank of Dallas, 521 F.Supp. 656, 26 FEP Cases 1127 (N.D. Tex. 1981).

8. The statistics presented by plaintiffs regarding defendants' sales force composition and hiring rates were compelling. These statistics included the following: In 1974, when plaintiff Kraszewski began to actively seek a trainee agent position, State Farm's California sales force was 99.9% male (1414/1416); in 1975, when her charges of discrimination were filed, defendants' sales force was 99.6% male; at the end of 1981, defendants' California sales force remained 96.5% male. State Farm hired *no* women agents in 1970, 1971, 1972, 1973, and only *one* in 1974 and 1977 (two women hired out of 695 trainee agent new hires). During the period 1970 through 1981, only 7.0% of the trainee agent new hires were women (95/1353).

Defendants' hiring rates and workforce composition fall far short of the availability of women in the population and California civilian labor force, as testified to by Professor John Pencavel, a labor economist, and create a

prima facie case of discrimination. Teamsters v. United States, supra; Hazelwood School District v. United States, supra; Dothard v. Rawlinson, supra; Gibson v. Local 40, Supercargoes & Checkers, supra; Kaplan v. IATSE, supra; Davis v. County of Los Angeles, supra; LULAC v. City of Santa Ana, supra; Piva v. Xerox Corp., 654 F.2d 591, 26 FEP Cases 1367, 1971 (9th Cir. 1981).

9. The Court rejects defendants' proposal to rely exclusively on AIB test-takers as the measure of female availability for the trainee agent position for the following reasons: (1) Defendants' test-taker flow data was not complete in that records for all applicants were not maintained, particularly oral applications; (2) Evidence of discriminatory recruitment practices and word-of-mouth recruitment by all-male managers; (3) Defendants' failure to post job notices or advertise job openings; (4) Nepotistic recruitment and selection practices that heavily favored males; (5) Differential use of subjective recruitment and selection practices; and (6) Defendants' active discouragement of female applicants and misleading and noninformative responses to inquiries by women. Dothard v. Rawlinson, supra; Blake v. City of Los Angeles, 545 F.2d 1367, 1375, 19 FEP Cases 1441, 1446 (9th Cir. 1979); Gay v. Waiters Union, Local 30, 22 FEP Cases 280 (N.D. Cal. 1979)* aff'd 694 F.2d 531, 30 FEP Cases 605 (9th Cir. 1982); Patterson v. Development Labs, 13 FEP Cases 772 (N.D. Cal. 1976); Robinson v. Union Carbide Corp., 538 F.2d 652, 13 FEP Cases 645 (5th Cir. 1976); Williams v.

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*[Ed note: – The correct citation is 489 F.Supp. 282, 22 FEP Cases 281 (N.D. Cal. 1980).]

Owens-Illinois, Inc., 665 F.2d 918, 27 FEP Cases 1273, 1279-80 (9th Cir. 1982).

10. In addition to the compelling statistical evidence of a pattern and practice of discrimination presented by plaintiffs, the Court finds that the testimonial evidence of specific acts of discrimination corroborate the statistics, and, in the words of the United States Supreme Court, "brought the cold numbers convincingly to life." Teamsters v. United States, 431 U.S. 324, 14 FEP Cases at 1514, 1520 (1977).

11. Plaintiffs' evidence established a prima facie case of classwide disparate treatment of women applicants and deterred applicants, which was not rebutted by defendants, Teamsters v. United States, 431 U.S. 324, 14 FEP Cases 1514 (1977).

12. Defendants' recruitment and selection system, which relied primarily on word-of-mouth recruitment by all male managers, use of multiple subjective criteria, male dominated advertisements, and male nepotism had a disparate impact on women, as represented by the low percentage of female AIB test-takers and female trainee agent hires. Nanty v. Barrows, 660 F.2d 1327, 27 FEP Cases 410 (9th Cir. 1981); Wang v. Hoffman, 694 F.2d 1146, 30 FEP Cases 703 (9th Cir. 1982); Peters v. Lieuallen, 693 F.2d 966, 30 FEP Cases 706 (9th Cir. 1982); Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 31 FEP Cases 50 (9th Cir. 1983); Paxton v. Union National Bank, 688 F.2d 552, 29 FEP Cases 1233, 1237 (8th Cir. 1982); Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 29 FEP Cases 963 (10th Cir. 1981); Brown v. Gaston County Dyeing Co., 457 F.2d 1377, 4 FEP Cases 514 (4th Cir. 1972), cert. den., 409

U.S. 982, 5 FEP Cases 149 (1972); Vuyanich v. Republic National Bank, 521 F.Supp. 656, 662, 26 FEP Cases 1127 (N.D. Tex. 1981).

13. Defendants' failure to advertise or post job openings, and reliance instead on word-of-mouth recruitment by all male managers violated Title VII because it perpetuated the exclusion of women in defendants' sales force. James v. Stockham Valves & Fittings Co., 559 F.2d 310, 15 FEP Cases 827 (5th Cir. 1977); Senter v. General Motors Corp., 532 F.2d 511, 12 FEP Cases 451 (6th Cir. 1976); Smith v. Union Oil of California, 17 FEP Cases 960 (N.D. Cal. 1977).

14. Defendants' policy and practice of male nepotism in recruitment and hiring violated Title VII because of its disparate impact on women, 383 male relatives were hired as agents compared to only 13 females. Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 31 FEP Cases 50 (1983); Gibson v. Local 40, Supercargoes & Checkers, 543 F.2d 1259, 13 FEP Cases 997 (9th Cir. 1976); Pate v. A.C. Transit, 21 FEP Cases 1228, 1234 (N.D. Cal. 1979); Domingo v. New England Fish Company, 455 F.Supp. 521, 19 FEP Cases 253 (W.D. Wash. 1977); United States v. Detroit Edison Co., 365 F.Supp. 86, 103, 6 FEP Cases 612 (D. Mich. 1973), aff'd, 515 F.2d 301, 10 FEP Cases 239 (6th Cir. 1975).

15. Defendants' reliance on multiple subjective criteria in its recruitment, selection and hire of trainee agents had a disparate impact on women and therefore was illegal. Nancy v. Barrows Co., 660 F.2d 1327, 27 FEP Cases 410, 416 (9th Cir. 1981); Wang v. Hoffman, 694 F.2d 1146, 30 FEP Cases 703 (9th Cir. 1982); Peters v. Lieuallen, 693 F.2d 966, 30 FEP Cases 706 (9th Cir. 1982); Smith v.

Union Oil of California, 17 FEP Cases 960, 991-93 (N.D. Cal. 1977); Rowe v. General Motors Corp., 457 F.2d 348, 4 FEP Cases 445 (5th Cir. 1972); Satz v. ITT Financial Corp., 619 F.2d 738, 22 FEP Cases 929 (8th Cir. 1980); Davis v. Califano, 631 F.2d 957, 21 FEP Cases 272 (D.C. Cir. 1979); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 4 FEP Cases 514 (4th Cir. 1972), cert. den., 409 U.S. 982, 5 FEP Cases 149 (1972); Houston v. Inland Marine Industries, 29 FEP Cases 557, 558 (N.D. Cal. 1982).

16. Defendants failed to prove by professionally accepted methods that its recruitment and selection practices and criteria were job related, predictive of or correlated with important elements of work behavior, necessary to safe and efficient job performance, and that no acceptable alternative policies or practices with less disparate impact were available. Blake v. City of Los Angeles, 595 F.2d 1367, 19 FEP Cases 1441, 1447 (9th Cir. 1979); Craig v. County of Los Angeles, 626 F.2d 659, 24 FEP Cases 1105 (9th Cir. 1980); Contreras v. City of Los Angeles, 656 F.2d 1267, 29 FEP Cases 1045 (9th Cir. 1981); deLaurier v. San Diego United School District, 588 F.2d 674, 18 FEP Cases 1148 (9th Cir. 1978); *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607.3(A).

17. Defendants' consistent discriminatory treatment of female applicants, method of publicizing trainee agent positions, recruitment practices, negative responses to inquiries by women regarding sales positions, and the predominately male composition of defendants' managerial force, operated to discourage and deter potential female applicants for trainee agent positions. Teamsters v. United States, 431 U.S. 324, 14 FEP Cases 1514, 1531-32 (1977); Dothard v. Rawlinson, 433 U.S. 321, 15 FEP Cases

10 (1977); Mitchell v. Mid-Continental Spring Co., 583 F.2d 275, 17 FEP Cases 1594, 1600 (6th Cir. 1978), cert. den., 441 U.S. 922, 19 FEP Cases 723; United States v. Ironworkers, Local 86, 443 F.2d 544, 3 FEP Cases 496 (9th Cir. 1971); Association Against Discrimination v. City of Bridgeport, 470 F.Supp. 101, 20 FEP Cases 985 (D. Conn. 1979), aff'd in part, vac. and rem. on other grounds, 647 F.2d 256, 25 FEP Cases 1013 (2nd Cir. 1981).

18. Defendants' use of male dominated advertising perpetuated the image of the State Farm sales agent as all male, and contributed to State Farm's reputation as a company that did not hire women sales agents. Wetzel v. Liberty Mutual Insurance Co., 372 F.Supp. 1146, 7 FEP Cases 34 (D. Pa. 1974), aff'd, 508 F.2d 239, 9 FEP Cases 211 (3d Cir. 1975), cert. den., 421 U.S. 1011, 10 FEP Cases 1056 (1975); Morrow v. Crisler, 3 FEP Cases 1162 (S.D. Miss. 1971), aff'd and rem. on other grounds, 491 F.2d 1053, 7 FEP Cases 586 (5th Cir. 1974), cert. den., 419 U.S. 845, 8 FEP Cases 1007; United States v. Real Estate Development Corp., 347 F.Supp. 776, 782-83 (D. Miss. 1972).

19. Individual plaintiffs Kraszewski, Jackson and Tipton established *prima facie* cases of unlawful disparate treatment. The reasons articulated by State Farm for their adverse treatment were shown to be pretextual. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981); Nanty v. Barrows, 660 F.2d 1327, 27 FEP Cases 410 (9th Cir. 1981); LULAC v. City of Salinas, 654 F.2d 557, 27 FEP Cases 409 (9th Cir. 1981).

20. Plaintiffs' statistical evidence of class discrimination reinforces the individual claims of plaintiffs Kraszewski, Jackson and Tipton. Heagney v. University of Washington, 642 F.2d 1157, 26 FEP Cases 438, 443 (9th Cir. 1981); Lynn v. Regents, University of California, 656 F.2d 1337, 28 FEP Cases 410 (9th Cir. 1981); Kyriazi v. Western Electric Co., 461 F.Supp. 894, 924, 18 FEP Cases 924 (D. N.J. 1978).

21. For the purposes of an award of costs and reasonable attorneys' fees, plaintiffs are the "prevailing party" within the meaning of 42 U.S.C. § 2000e-5(k).

KRASZEWSKI v. STATE FARM INS. CO.

U.S. District Court,
Northern District of California

KRASZEWSKI v. STATE FARM GENERAL INSURANCE COMPANY, et al., No. C79-1261 TEH, July 17, 1986

Full Text of Opinion

HENDERSON, District Judge: – This matter is before the court on cross-motions for an Order Governing Stage II Proceedings. Plaintiffs have also filed a related Motion to Strike Declarations and a Motion for Partial Summary Judgment.

After a bifurcated trial on liability, in the Findings of Fact and Conclusions of Law filed on April 29, 1985, this court found defendants liable under Title VII for sex discrimination on a class-wide basis. Now, at Stage II of the proceedings, the court must determine the appropriate relief to compensate the plaintiff class members. After lengthy oral argument, and upon careful consideration of the extensive briefing filed with respect to these motions, the court took the matter under submission on June 18, 1986. The court hereby issues the following Order, which sets forth the framework for the Stage II proceedings in this case.

A. FORM OF RELIEF

The parties' primary dispute revolves around the form of the relief the court should order. Defendants prefer a class-wide formula; plaintiffs prefer individualized hearings. Both types of relief have been ordered in Title VII cases and clearly are permitted by law and

satisfy constitutional due process concerns. The issue for this court is to determine which remedy is most appropriate under the particular circumstances of this case.

The goal at the remedy stage of Title VII is to "make the victims of unlawful employment discrimination whole, and . . . restored to a position where they would have been were it not for the unlawful discrimination." Franks v. Bowman, 424 U.S. 747, 764, 12 FEP Cases 549 (1976). See also Albemarle Paper Co. v. Moody, 422 U.S. 405, 418, 10 FEP Cases 1181 (1975) ("It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful discrimination.").

Given the Supreme Court mandate of "make whole" ~~relief,~~ it is not surprising that the *preferred* method of determining damages in Title VII cases is by the use of individualized hearings. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 371-372, 14 FEP Cases 1514 (1977); Domingo v. New England Fish Co., 727 F.2d 1429, 1444, 34 FEP Cases 584 (9th Cir. 1984); McKenzie v. Sawyer, 684 F.2d 62, 75-77, 29 FEP Cases 633 (D.C. Cir. 1982); Schaeffer v. Tannian, 538 F.2d 1234, 1235, 13 FEP Cases 528 (6th Cir. 1976); United States v. United States Steel, 520 F.2d 1043, 1054, 11 FEP Cases 553 (5th Cir. 1975), cert. denied sub nom., United States Steel Corp. v. United Steelworkers of America, 429 U.S. 817, 13 FEP Cases 962 (1976). In individual hearings, each victim of unlawful discrimination may prove what injuries she has suffered and thus the court can ensure that the victim is fully compensated.

On the other hand, despite this avowed preference for individualized relief, a number of courts have held

that a class-wide formula remedy may be appropriate under certain circumstances. See e.g., Domingo v. New England Fish Co., supra, 727 F.2d 1429, 34 FEP Cases 584; Segar v. Smith, 738 F.2d 1249, 35 FEP Cases 31 (D.C. Cir. 1994 [sic]), cert. denied sub nom., Meese v. Segar, – U.S. –, 105 S.Ct. 2357, 37 FEP Cases 1312 (1985); Association Against Discrimination in Employment v. City of Bridgeport, 479 F.Supp. 101, 20 FEP Cases 985 (D.Conn. 1979), aff'd, 647 F.2d 256 (2d Cir. 1981), cert. denied sub nom., Bridgeport Firefighters for Merit Employment v. Ass'n Against Discrimination in Employment, 455 U.S. 988, 28 FEP Cases 120 (1982); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 7 FEP Cases 1115 (5th Cir. 1974) (Pettway III). The courts that have ordered class-wide relief have sought to avoid "a quagmire of hypothetical judgments." Pettway III, 494 F.2d at 260; Stewart v. General Motors Corp., 542 F.2d 445, 13 FEP Cases 1035 (7th Cir. 1976), cert denied, 433 U.S. 919, 15 FEP Cases 31 (1977). In those cases, there were a large number of claimants vying for a small number of openings, and the court would be forced into making speculative judgments as to what decisions the employer might have made. In other cases, the court ordered class-wide relief when individualized hearings would strain judicial manageability and economy beyond feasible limits. Pettway III, 494 F.2d at 260; Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 17 FEP Cases 1712 (5th Cir. 1978) (Pettway IV), cert. denied, 439 U.S. 1115, 18 FEP Cases 1430 (1979).

Defendants argue here that those special circumstances exist in this case and require a departure from the preference for individualized relief. For example, defendants insist that individual hearings would "entangle this

Court . . . into the twenty-first century" and, at a minimum, "produce a process spanning 7000 consecutive days – more than nineteen years." (Defendants' Opposition to Plaintiffs' Motion for Stage II Remedy at 3). Defendants also argued at the hearing that they will be notifying over 50,000 potential class members who may vie for 214 positions (according to State Farm's "shortfall"[1] approach). Consequently defendants maintain, individualized hearings are judicially unmanageable and too speculative and complex to afford appropriate relief.

The court disagrees. On the basis of the record before the court, defendants' bogeyman of nineteen years is not credible. Rather, plaintiffs' projection that the claims procedure would take only 2-3 years appears far more reasonable, both in light of the facts of this case and of this court's past experience with litigation of this nature. As plaintiffs point out, it is unrealistic to assume, as defendants did, that only one attorney would work on all anticipated one thousand claims. Moreover, plaintiffs reasonably assert that many of the claims would settle, obviating the need for a large number of individual hearings. Therefore, based on the reasonable projections of the plaintiffs, the court finds that an individual process in this case appears to be of manageable proportions, in keeping with the considerations expressed by those courts approving individualized hearings. See e.g., cases cited supra, at 2-3.

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[1] Defendants' concept of "shortfall" – the number of positions which they allege constitutes their maximum liability – is discussed in Part B of this Order.

In addition, the court finds that this case is easily distinguishable from other cases in which courts found that individualized relief would be too speculative and too complex. First of all, this case involves discrimination only in one entry-level position. It concerns hiring, not promotion, and thus would not require the court to trace long, complex, and speculative career patterns. As the court in Segar v. Smith, supra, 738 F.2d at 1289-90, explained, there is a "presumption" in favor of individualized hearings," especially for claims of discrimination in initial job assignments:

> These determinations are akin to those in Teamsters, where the required hearings were to involve a single determination as to whether individual plaintiffs had applied and were qualified for particular line driver positions in the trucking industry.

Id., at 1290.

On the other hand, for upper-lever positions, in which there was discriminatory promotion, evaluation, discipline, salary and work assignments that "impeded blacks at every turn," the court ordered class-wide formula relief because it was too difficult to trace career patterns and would result in speculative determinations. Id.

Moreover, the plaintiffs have agreed to the use of stipulated average earnings in order to make the back pay calculation simple. Since the court has already found the defendants liable for discrimination, the questions to be determined at the hearings are straightforward. The burden upon claimants is simply to demonstrate that they applied or were deterred from applying for insurance agent positions with defendants. Teamsters, 431 U.S. at 362. Once that burden is met, defendants bear the "heavy

burden" of showing by "clear and convincing" evidence that even absent discrimination the individual would not have been selected. See Nanty v. Barrows Co., 660 F.2d 1327, 27 FEP Cases 410 (9th Cir. 1981).

Finally, and perhaps most importantly in determining how best to achieve make whole relief, the court has considered the monetary effect that a class-wide formula would have on individual class members. Although both individual and formula relief may satisfy due process, where large sums of money are at stake, the presumption in favor of individualized hearings would appear to be critical.[2] In this case, unlike in the cases cited by defendants, individual class members are alleging entitlement to very large back pay awards as full compensation for their injuries. Plaintiffs contend that full relief is potentially $500 million for approximately 1000 claimants. Cf., EEOC v. Hiram Walker, 768 F.2d 884, 38 FEP Cases 820 (7th Cir. 1985) ($165,000 for 253 class members). Laffey v. Northwest Airlines, 35 FEP Cases 508 (D.C.Cir. 1984) ($24.5 million for 3200 class members); Ingram v. Madison Square Garden Center, 709 F.2d 807, 32 FEP Cases 641 (2d Cir. 1983), cert. denied sub nom., Local Union 3 v. Ingram, 464 U.S. 937, 33 FEP Cases 48 (1983) ($663,000 for 18 claimants); Elliott v. Sperry Rand Corp., 680 F.2d 1225, 29 FEP Cases 1281 ($1.5 million for 3000 class members); Patterson v. Youngstown Sheet & Tube Co., 659 F.2d 736,

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[2] The court is also concerned that if class-wide relief resulted in an unduly harsh financial penalty for named plaintiffs, the class action mechanism would be eviscerated in an area where it has been invaluable in eliminating widespread discrimination.

28 FEP Cases 1434 (7th Cir.), cert. denied, 454 U.S. 110, 28 FEP Cases 1655 (1981) ($28,400 for 55 claimants); Hameed v. I.A.M. Local 396, 637 F.2d 506, 24 FEP Cases 352 (8th Cir. 1980) ($450,000 for 45 claimants); Love v. Pullman, 569 F.2d 1074, 16 FEP Cases 745 (10th Cir. 1978) ($4.3 million for 1500 class members); Pettway III, supra, 494 F.2d 211, 7 FEP Cases 1115 ($2,864,703 for 2242 members of the original class); Bigby v. City of Chicago, 38 FEP Cases 844 (N.D. Ill. 1984), aff'd, 766 F.2d 1053, 38 FEP Cases 853 (7th Cir. 1985), cert. denied sub nom., Thoele v. City of Chicago, – U.S. –, 106 S.Ct. 793, 39 FEP Cases 1200 (1986) ($211,000 for 41 class members); Howard v. McLucas, 597 F.Supp. 1504, 36 FEP Cases 1196 (M.D. Ga. 1984) ($3.75 million for 3200 class members).

In light of these important distinctions, defendants have not persuaded the court based on the current record that the extraordinary method of class-wide relief is required in this case. The court has balanced the advantages and disadvantages of both methods of Stage II relief and issues its Order based on the assumptions underlying plaintiffs' arguments, particularly that only approximately one thousand claims will be filed in this case. Consequently, if, upon receipt of the claim forms, it is obvious that many more than one thousand claims establish a *prima facie* case, this court will be open to a motion from defendants to reconsider on the basis that individual hearings will be unwieldy. On the other hand, assuming plaintiffs' estimation is substantially correct, the court hereby orders individual hearings for the Stage II proceedings in this case.

B. NUMBER OF POSITIONS FOR WHICH DEFENDANTS ARE LIABLE

Defendants argue that they are liable for compensating victims *only* for their failure to hire women in 214 positions from 1974 to 1985. Defendants arrive at this figure – the "shortfall" – by calculating the number of positions that they "should have" filled with class members if they had hired women in proportion to their labor force availability and then subtracting the number of women actually hired. (Defendants' Memorandum in Support of Stage II Order at 28).

Defendants claim to have arrived at this shortfall methodology, in part, because of this court's Findings in Stage I that

> Defendants' hiring rates and workforce composition fall far short of the availability of women in the population and Californian civilian labor force . . . and create a *prima facie* case of discrimination.

Kraszewski v. State Farm Insurance Co., 38 FEP Cases 197, 259 (N.D. Cal. 1985) [hearinafter, "Kraszewski Findings"].

Defendants then extrapolate from that Finding to argue that "[h]ad State Farm's hiring rates and workforce composition not 'fallen short,' there would have been no class-wide liability finding at Stage I, and by the same token, no Stage II." (Reply of State Farm to Opposition to Stage II Motion at 8).

In fact, the court merely used the available statistics to find a *prima facie* case of discrimination. The court also made numerous other Findings as to instances of intentional discrimination. In addition, the court found that

Defendants' recruitment and selection system, which relied primarily on word-of-mouth recruitment by all male managers, use of multiple subjective criteria, male dominated advertisements, and male nepotism had a disparate impact on women . . . .

Kraszewski Findings, at 260.

Thus, given the court's findings of both disparate treatment and disparate impact beyond the mere statistics, it does not necessarily follow that the court would have found no discrimination even if State Farm's workforce consisted of 40% women.

Moreover, defendants' attempt to cap their liability at 214 positions, based on the court's estimate of labor force availability, contravenes Supreme Court precedents, which clearly hold the defendants may not rely on a "bottom-line" defense. Connecticut v. Teal, 457 U.S. 440, 29 FEP Cases 1 (1982). Although defendants accurately point out that Teal involved a Stage I determination, the principle it stands for is clearly applicable to all stages of Title VII law. That is Title VII focuses on whether *individuals* have suffered discrimination, not merely the status of the protected group as a whole. Teal, 457 U.S. at 455 ("Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired."); Furnco Construction Corp. v. Waters, 438 U.S. 567, 579, 17 FEP Cases 1062 (1978) ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination."); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 17 FEP Cases 395 (1978), Phillips v. Martin Marietta Corp., 400

U.S. 542, 3 FEP Cases 40 (1971); Diaz v. American Telephone & Telegraph Co., 752 F.2d 1356, 1360, 36 FEP Cases 1742 (9th Cir. 1985) ("Title VII's focus on the rights of individual members of a protected class is 'unambiguous.' ") (quoting Arizona Governing Committee v. Norris, 463 U.S. 1073, 103 S.Ct. 3492, 3496, 32 FEP Cases 233 (1983)). Thus, defendants here may not assert that had they hired a workforce of 40% women, then there was necessarily no discrimination against individual women beyond the 40% figure.

Rather, all class members are entitled to show that they were actual victims of discrimination as to any of the vacancies that occurred during the period of liability and that were filled by men.[3] The court's estimate of a 40% female availability cannot be utilized to predict how many women would have *actually* been hired absent discrimination. The only way to determine the actual victims is to give each class member the opportunity to demonstrate she was discriminated against with respect to any of the 1250 vacancies filled by men.

In sum, the court's use of the terms "fall far short" in reference to the Finding of a *prima facie* case of liability does not amount to a decision on remedies. Such a finding was merely one factor that demonstrated the pervasiveness of the discrimination at State Farm. Therefore,

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[3] Plaintiffs concede that they will not seek compensation for those vacancies filed by women, although they argue that they are entitled to do so (Plaintiffs' Memorandum in Opposition to Defendants' Stage II Motion at 42-43); See also Diaz, supra, 752 F.2d 1356.

in order to determine the precise extent of the discrimination and to identify the actual victims, the court will allow individual class members to make claims as to each of the 1250 vacancies.

C. EXTENT OF NOTICE

The parties are in substantial agreement concerning the extent of mailed notice. However, the parties are in completely different ballparks in their approaches to published notice. Defendants propose to spend approximately $40,000 to place quarter-page ads in the classified advertising sections of five major California newspapers. Plaintiffs seek an extensive national media campaign, including TV and radio spots, that could cost up to $3 million dollars.

The court does not intend, at this point in time, to enter the fray and work out the details of a sufficient publication scheme. Nonetheless, the court notes that given the fact that 50,000 potential class members will receive mailed notice, the court does not see the need for the full-blown national campaign envisioned by plaintiffs. However, defendants' proposal also appears insufficient, and the court suggests the parties attempt to work out a reasonable publication plan that would cost approximately $200,000.

Accordingly, the court hereby orders the parties to meet and confer to work out the form and extent of both the mailed notice and publication plan. If, after 90 days, the parties have failed to come to an agreement, the parties may move this court for an Order on this specific issue.

D. OTHER REMEDIES ISSUES

Upon the defendants' suggestion, this court has ruled only on the two major issues raised: 1) the form of relief and, 2) the number of vacancies for which defendants are potentially liable. The court agrees with the defendants that the parties appear to be closer on agreement as to many of the other remedies issues than plaintiffs' rhetoric would lead us to believe. Thus, the court strongly urges the parties to continue negotiations over the specific details that will govern the Stage II proceedings. Once the claim forms have been returned, this court will entertain motions to resolve the remaining disputes over the form and extent of the Stage II relief.

E. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Given the court's foregoing order, it is not appropriate at this time to grant plaintiffs' motion for partial summary judgment. First of all, depending on the number of claims filed, there still remains the possibility that class-wide formula relief may be necessary. Second, there are a number of issues that the court has not yet determined that are still in dispute and are material to the motion for summary judgment. For example, the court used the alternative figures of 30% and 40% in its Findings of Fact as to the expense factor used to calculate net earnings. Kraszewski Findings, at 210-11. The court has not yet determined which figure should be used at the remedies stage. In addition, there are apparently mitigation issues in dispute concerning plaintiff Wilda Tipton.

Accordingly, IT IS HEREBY ORDERED that plaintiffs' motion for partial summary judgment is denied.

F. PLAINTIFFS' MOTION TO STRIKE

Plaintiffs have moved this court to strike the declarations of Erica B. Grubb and Deborah W. Trotter filed in support of Defendants' Reply to Plaintiffs' Opposition to State Farm's Motion for Stage II Order. Plaintiffs contend that the declarations and attachments constitute inadmissible hearsay, or are otherwise not properly before this court.

In response to plaintiffs' motion, defendants have filed an Amended Declaration, in which Ms. Grubb relies solely on public documents, not telephone conversations. Thus, the court may take judicial notice of the documents, pursuant to Rule 201, Federal Rules of Evidence (F.R.E.). Moreover, the Attachment is properly admissible as a summary of those documents and is admissible pursuant to Rule 1006, F.R.E. Obviously, the court does not rely on any unpublished decisions cited therein for legal precedent. Therefore, the court denies the motion to strike as to Ms. Grubb's amended declaration and attachments.

On the other hand, to the extent that Ms. Trotter's declaration and attachments are based on telephone conversations, and not public documents, and thus constitute inadmissible hearsay, the court hereby grants the motion to strike.

G. CONCLUSION

For all the foregoing reasons, IT IS HEREBY ORDERED that plaintiffs are entitled to individualized hearings in order to ensure "make whole" relief. In the event that an unanticipated and unwieldy number of meritorious claims are filed, defendants may move to reconsider this order.

To begin the Stage II proceedings, counsel should attempt to work out the form and extent of the mailed notice and publication plan within 90 days of the date of this Order. If the parties are unable to agree, the matter may be brought before this court after the 90 day period.

IT IS SO ORDERED.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MURIEL E. KRASZEWSKI, DAISY O. JACKSON and WILDA TIPTON, on behalf of themselves and all other persons similarly situated, Plaintiffs, v. STATE FARM GENERAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, and STATE FARM FIRE AND CASUALTY COMPANY, Defendants.	) Case No. C-79-1261 TEH

CONSENT DECREE REGARDING
MONETARY RELIEF, INSTATEMENT
RELIEF, AND NOTICE

* * *

e. *Amount of Damages:*

i. Damages for a Successful Claimant, other than one who was appointed by State Farm to a Trainee Agent position during the Liability Period, shall begin accruing no earlier than July 5, 1974; shall be unaffected by the "continuing violation" theory or any "escalator-of-damages" concept arising under that theory; and shall be calculated to the date of judgment, except as otherwise provided in this Decree, as set forth in Exhibit 9.

(1) It is understood that these distributions shall not constitute pay from State Farm for the purposes of any employee benefit plans, and no credit or benefit shall accrue under such plans by reasons of these payments.

(2) It is understood that Trainee Agents are State Farm employees and hold their status as Trainee Agents for two years, whereas Career Agents are independent contractors and hold Career Agent status for an indefinite period. Therefore, only the positive damages, if any, attributable to the first two years of a Claim Amount shall be considered back pay subject to state and federal tax withholdings.

ii. Damages for a Successful Claimant who was appointed by State Farm to a Trainee Agent position during the

Liability Period shall begin accruing no earlier than July 5, 1974; shall be unaffected by the "continuing violation" theory or any "escalator-of damages" concept arising under that theory; and shall be calculated to the date of judgment, except as otherwise provided in this Decree, as set forth in Exhibit 9.

iii. *Liability Termination*: The parties agree that claimants shall be entitled to prejudgment interest at the rates set forth in Exhibit 9. The parties disagree regarding the date liability for back pay should terminate. The parties agree that this issue shall be presented to the District Court for resolution at or near the time of the Consent Decree Fairness Hearing and that either party may appeal the liability termination date set by the District Court to the Ninth Circuit Court of Appeals or the Supreme Court. For the purposes of implementing the terms of this Section VII.G.4.e.iii (page 61), the parties agree that:

(a) They shall simultaneously file and serve their opening briefs and reply briefs on the issue of liability termination according to a mutually agreed litigation timetable. The parties' opening and reply briefs may not exceed the twenty-five (25) page limit set forth in Local Rule 220-4.

(b) The parties agree that the decision regarding termination of

liability is of critical importance to the claims procedure set forth in this Decree, and that any appeal of such decision should be resolved as expeditiously as possible.

(c) If the District Court declines to certify the issue for interlocutory appeal or if the Ninth Circuit declines to accept the interlocutory appeal, State Farm shall retain its right of appeal until the issue is certified and accepted by the Ninth Circuit.

(d) If an appeal is taken and accepted by the Ninth Circuit, the implementation of the terms of this Decree shall not be stayed and shall continue throughout the appeal process.

(e) If the Court terminates back pay liability on a date which precedes the end of the Hold Period, damages for Successful Claimants shall be calculated in accordance with Exhibit 9 up to the date set by the Court. If the Court terminates back pay liability on a date which follows the end of the Hold Period, damages for Successful Claimants shall be calculated, during the period of any appeal, in accordance with Exhibit 9 up to the date on which the Hold Period ends. No later than thirty (30) days after the exhaustion of all avenues of

appeal taken from the liability termination decision of the Court, State Farm shall pay any additional damages due Successful Claimants as set forth in Exhibit 9.

* * *

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MURIEL E. KRASZEWSKI, DAISY O. JACKSON and WILDA TIPTON, on behalf of themselves and all other persons similarly situated, Plaintiffs, v. STATE FARM GENERAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, and STATE FARM FIRE AND CASUALTY COMPANY, Defendants.	) Case No. C-79-1261 TEH

EXHIBIT 9 TO CONSENT DECREE REGARDING MONETARY RELIEF, INSTATEMENT RELIEF AND NOTICE

DAMAGES

* * *

E. *Procedures for Determining the Dates to Which Back Pay, Prejudgment Interest, Front Pay, and Postjudgment Interest Shall Be Calculated for Individual Damage Awards*

1. *Entitlement Dates*: Under this Decree, entitlement to damages can arise only on one of five dates ("Entitlement Dates"):

   a. The date on which State Farm deposits in the Escrow Account the full settlement amount for a claim in which only one Final Claimant challenges a specific appointment. ("Entitlement Date" for "Single Claimant Automatic Settlement");

   b. The date on which State Farm deposits in one Escrow Account the full settlement amount for a claim in which multiple Final Claimaints challenge a specific vacancy ("Entitlement Date" for "Multiple Claimant Automatic Settlement");

   c. The date on which the parties agree to settle a Final Claim for less than its full settlement amount ("Entitlement Date" for "Negotiated Settlement");

   d. The date of the written judgment of a Hearing Master in favor of a Final Claimant, if no appeal is taken to the Chief Special Master ("Entitlement Date" for an "Unappealed Judgment"); and

   e. The date of the written decision of the Chief Special Master sustaining a judgment in favor of a Final Claimant on appeal ("Entitlement Date" for an "Appealed Judgment").

2. *Damage Calculation Dates*: Except as set forth in Section VII of this Decree, the Back Pay,

Prejudgment Interest, and Front Pay due on the Entitlement Dates specified above and the Post Judgment Interest due after the Entitlement Dates specified above shall be calculated to cover only the periods of time set forth below:

a. *Single Claimant Automatic Settlements*: Back Pay shall be calculated to the Entitlement Date, by projection if necessary. Prejudgment Interest shall be calculated to the Entitlement Date. Front Pay shall be calculated as of the Entitlement Date. Postjudgment Interest shall be calculated from the Entitlement Date to the date that State Farm receives the executed Settlement Agreement.

b. *Multiple Claimant Automatic Settlement*: Back Pay shall be calculated to the Entitlement Date, by projection if necessary. Prejudgment Interest shall be calculated to the Entitlement Date. Front Pay shall be calculated as of the Entitlement Date. Postjudgment Interest shall be calculated from the Entitlement Date to the date that State Farm receives the last executed Settlement Agreement.

c. *Negotiated Settlements*: Negotiated Settlements are not governed by the calculation rules for any of the types of damages available under this Decree.

d. *Unappealed Judgments*: Back Pay shall be calculated to the Entitlement Date, by projection if necessary. Prejudgment Interest shall be calculated to the Entitlement Date. Front Pay shall be calculated as of the Entitlement Date. Postjudgment Interest shall be calculated from the Entitlement Date to a date not more than 15 days before the date that State Farm

mails the damage check to the Successful Claimant.

e. *Appealed Judgments*: Back Pay shall be calculated to the Entitlement Date, by projection if necessary. Prejudgment Interest shall be calculated to the Entitlement Date. Front Pay shall be calculated as of the Entitlement Date. Postjudgment Interest shall be calculated from the Entitlement Date to a date not more than 15 days before the date that State Farm mails the damage check to the Successful Claimant.

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No. 90-1179

Supreme Court, U.S.
FILED
MAR 27 1991
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

STATE FARM GENERAL INSURANCE COMPANY,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
STATE FARM LIFE INSURANCE COMPANY, AND
STATE FARM FIRE AND CASUALTY COMPANY,
Petitioners,
v.
MURIEL E. KRASZEWSKI, DAISY O. JACKSON, AND WILDA TIPTON,
ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS
SIMILARLY SITUATED,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

At the remedies phase of an employment discrimination class action, do district courts have discretion to provide for the accrual of back pay for individual class members as seems appropriate in light of the facts and circumstances of the case?

LIST OF PARTIES

There are no parties to this action other than those identified in the caption of the within action.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1179

STATE FARM GENERAL INSURANCE COMPANY, et al.,
Petitioners,

v.

MURIEL E. KRASZEWSKI, et al.,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION

The issue presented by this Petition is a discrete and straightforward remedies question: whether district courts have the discretion to fashion make-whole relief according to the facts and circumstances of the particular case before them. The issue has *nothing* to do with the events that occurred during the liability phase of

this case. The Brief in Opposition obscures this issue through three arguments: (1) attempting to convince this Court that there have been voluminous factual findings that prevent a review of the district court's decision; (2) attempting to convince this Court that State Farm was a "bad employer" who does not deserve to be heard by this Court; and (3) attempting to convince this Court that the district court in fact exercised the discretion sought through this Petition. None of these arguments is valid, and State Farm will briefly address each of them in turn.

I. The District Court's Decision Was Not Based Upon Exhaustive Factual Findings.

The Opposition requested, and obtained, an enlargement of time in order to file an additional one and one-half volumes of material that, although part of the same case, are not relevant to this appeal.[1] The voluminous appendix – which deals largely with the *liability phase* of the case – apparently is intended to suggest that a review of the district court's decision would be inappropriate because it was based on exhaustive factual findings. Nothing could be further from the truth.

The district court's order was based on its understanding of the *law*, not its understanding of the facts. Indeed, at oral argument, the district judge stated:

> It appears to me that the facts favor State Farm and the law appears to favor plaintiffs. . . . I find myself wondering whether I have the discretion to choose one of these two dates [March 15, 1988 or the date of each individual judgment] or to otherwise compromise this dispute.

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[1] Only nine pages of the 296-page appendix pertain to the consent decree which carved out the issue presented to this Court.

The district court felt that it had *no choice* but to order the continuation of back pay accrual to the date of each individual claim hearing, and it is this issue that is raised by the Petition.

II. The Petitioner's Conduct Does Not Justify Denial of This Petition.

Reduced to its core, the Opposition's argument is that State Farm is a "bad employer," not entitled to an equitable evaluation of the date for termination of back pay accrual, and obligated to continue back pay during the "delay" between March 15, 1988 and the date of each settlement or judgment. This argument is inconsistent with the facts and the law.

The facts, as contained in the record, are that after receiving the district court's *Stage I findings*: (1) State Farm substituted new counsel; (2) State Farm appointed women to approximately fifty percent of its Trainee Agent positions in California; (3) the district judge explicitly commended State Farm in its June 8, 1988 Order, stating "We do believe that, following change of counsel, State Farm has 'done equity.' State Farm has committed itself to both compensating harmed individuals and altering its discriminatory conduct" (Appendix to Petition, p. A-18); and (4) State Farm has *agreed* to accrue back pay from a date *five years before the complaint was filed* (July 5, 1974) to the date of class judgment *five years after the close of the Stage I trial* (March 15, 1988), for a total of *thirteen and one-half years* of back pay that is not disputed.[2]

The law provides that equitable decisionmaking under Title VII must reconcile *all* interests, public and private, employer and

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[2] Accruing back pay to the date of class judgment compensates for every delay that is even arguably attributable to State Farm. Any delay caused by the timing of the claim procedure is not due to State Farm, but is the result of the district court's decision to order individual hearings, rather than formula relief.

employee. *See, e.g., Pitre v. Western Electric Co.*, 843 F.2d 1262, 1278 (10th Cir. 1988) (commending the district court for "properly attempt[ing] to balance the employer's and the employees' interests"). The Opposition's presentation on this issue is inaccurate, misleading, and ultimately not helpful to this Court's determination.

III. Neither Lower Court Decision Reflects a Proper Understanding or Application of a District Court's Discretion in Fashioning a Make-Whole Remedy.

Finally, the Opposition attempts to convince the Court that the issue raised in this Petition was addressed by the courts below. The lower court opinions speak for themselves. Neither opinion seriously discusses the applicability of discretion in fashioning a remedy that takes into consideration the facts and circumstances of the particular case. Neither opinion seriously examines the discrepancy created by *mandating* continued back pay accrual in *hearings cases*, yet permitting back pay accrual to terminate at the time of class judgment in *formula relief cases*, while describing *both* as make-whole relief. Instead, the opinions below adopt a presumption that when individual hearings are conducted, back pay *must accrue* through judgment absent compelling circumstances to the contrary.[3] This is precisely the issue State Farm asks this Court to consider.[4]

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[3] The district court's June 8 Order cited *and adopted* the position of Class Counsel that the district judge's discretion was "confined" by a "legal rule" subject only to an exception for "compelling reasons." Such a position does not constitute the exercise of discretion.

[4] The Opposition blatantly attempts to mislead this Court in its statement that "the Claim Procedure Consent Decree *expressly* provides that back pay 'shall be calculated to the date of judgment.'" Brief in Opposition, p. 11. The reality is that the consent decree *expressly provides* that back pay accrual is an *open question* left to litigation and appeal.

CONCLUSION

The Petition presents a narrow remedies issue. State Farm does not ask this Court to determine the appropriate make-whole remedy presented by these particular facts and circumstances. Rather, State Farm asks this Court to affirm that district courts have discretion to order the back pay accrual that they find most equitable in light of the facts and circumstances of each case, and to reverse and remand for further proceedings consistent with this standard.

Respectfully submitted,

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